

Standards of Liability for Internet Service Providers: A Comparative Study of France and the United States with a Specific Focus on Copyright, Defamation, and Illicit Content

Xavier Amadei

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Standards of Liability for Internet Service Providers: A Comparative Study of France and the United States with a Specific Focus on Copyright, Defamation, and Illicit Content

Xavier Amadei*

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* Candidate for JD-Maitrise en droit des affaires internationales (Cornell-Paris I); ESSEC-MBA, Ecole Supérieure des Sciences Economiques et Commerciales (Paris); Masters, International Economic Relations, Institut d'Etudes Politiques (Paris). I wish to thank the former and the current *Cornell International Law Journal* Boards of Editors for their support and their helpful comments. I especially thank Annette Gifford, Kat Kinkade, and Aaron Wasserman. I also thank Ann Marie Luciano and H. Slim for their comments relating to French case law and regulations.

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Introduction

The Internet has evolved from a closed network (then called Arpanet)¹ available to a limited number of U.S. officials and universities to a world-wide network available to virtually anybody, through the World Wide Web (the Web).² This evolution resulted in the dissemination of digital information, coded in HyperText Markup Protocol (HTML) and available at its

1. The Pentagon created Arpanet in 1969, after two scientists at UCLA had managed to connect two computers together. Nicolas Valluet, *Pr sentation G n rale des Nouvelles Technologies de Communication et d'Information*, LES PETITES AFFICHES, no. 134, at 8 (Nov. 6, 1996).

2. *Id.* The Internet is distinct from the World Wide Web. Internet represents an infrastructure (all the computers linked together), a community of users, and the data they share. The World Wide Web is a network of computers linked together on the Internet that deliver data through their virtual links. Fran oise Tajan, *Pr sentation d'Internet et d'un Serveur Web*, LES PETITES AFFICHES, no. 134, at 10 (Nov. 6, 1996); see also Alain Strowel & Nicolas Ide, *Liability of Internet Intermediaries: Recent Developments and the Question of Hyperlinks*, 185 REVUE INTERNATIONALE DU DROIT D'AUTEUR 3, 15-23 (2000).

unique address, the Uniform Resource Locator (URL).³ Both the codification and the localization of digital information make it available from any computer connected to the World Wide Web through a software, the browser.⁴ Posting, finding, and accessing information on the Web is made possible by intermediaries: the Internet Service Providers (ISPs) that encompass Internet Access Providers (IAPs), Internet Content Providers (ICPs), and Logical Access Providers (LAPs).⁵

The accessibility of vast amounts of information has challenged the traditional legal structure of intellectual property law and of torts. Posting information on the Web and copying possibly copyrighted materials is fairly easy. This explains why defamation and copyright infringement have revealed the weaknesses of the traditional legal structure and proves the accompanying need for adaptation and legislative innovation.⁶ Technological innovation and widespread accessibility to information have turned anything posted on the Web into a potential public good since the Web is both non-rival and possibly non-excludable.⁷

The Web offers numerous commercial services, often accessible within an international framework; therefore, some infractions on the Internet involve international legal issues with important economic and business implications. Courts in the United States and in France have illustrated these polycentric topics in decisions extensively discussed by the media and scholars.⁸ In the United States, the focus has long been on

3. Jo Dale Carothers, *Protection of Intellectual Property on the World Wide Web: Is the Digital Millennium Copyright Act Sufficient?*, 41 ARIZ. L. REV. 937, 939-42 (1999).

4. *Id.*

5. David N. Weiskopf, *The Risks of Copyright Infringement on the Internet: A Practitioner's Guide*, 33 U.S.F. L. REV. 1, 7 (1998); see also Jose I. Rojas, *Liability of ISPs, Content Providers and End-Users on the Internet*, 507 PRACTISING L. INST. PAT. 1009, 1016-17 (1998). IAPs offer links to the Internet and generally nothing more. ICPs generally offer a link to the Internet and display contents on their specific spaces. LAPs provide search engines and other tools relating to the localization of content on the Internet. In this Note, the author will refer to ISPs indistinctly. However, LAPs do not fall under the scope of this Note. Moreover, whenever this Note will address specific ISP liability, it will also describe the kind of services they offer; this will qualify, when necessary, the specific category or categories of ISPs concerned.

6. See generally Jennifer Burke Sylva, *Digital Delivery and Distribution of Music and Other Media: Recent Trends in Copyright Law; Relevant Technologies; and Emerging Business Models*, 20 LOY. L.A. ENT. L. REV. 217 (2000). On the French general approach to regulation and the Internet, see Ministère de l'Économie, des Finances et de l'Industrie [French Department of Economy, Finance and Industry], *Consultation publique sur l'adaptation du cadre législatif de la société de l'information: Compte-rendu général de la Consultation*, at <http://www.finances.gouv.fr>, Vie des Entreprises: Accès Thématique: Nouvelles Technologies Files (Apr. 2000).

7. Those economic terms apply well to the Internet. It is 'non-rival' because theoretically an infinite number of users, facilities permitting, can access a Web site and its pages at the same time. It is 'non-excludable' because it is technically difficult to exclude specific users from using posted information.

8. For a thoughtful presentation of the main legal topics relating to the Internet in the U.S., see generally Jeffrey P. Cunard et al., *Selected Topics in Internet and E-Commerce Law*, 627 PRACTISING L. INST. PAT. 381 (2000).

Napster's alleged copyright infringements;⁹ in France, the *Yahoo!* case, related to the passionate debate over the display and sales of Nazi memorabilia on an auction Web site, has drawn attention.¹⁰ In both countries, despite new specific regulations, ISPs may remain liable in the United States under the traditional common law and in France under the Civil and Penal Laws. This Note analyzes the convergences between both systems and discusses the remaining differences. It also argues that although these differences may call for harmonization, uniformity is both illusory and unnecessary.

Part I of this Note describes the French and U.S. judicial solutions developed before the legislatures implemented a statutory framework to assess ISP liability. U.S. courts and many French courts have analogized ISP liability to the one of media actors.¹¹ As a result, the scope of ISP liability under defamation law has been uncertain depending on whether courts analogized ISPs to publishers or to distributors. Noticeably, uncertainty also prevailed regarding the critical issue of ISP liability for third-party infringements, in particular for online copyright infringement.¹²

Part II discusses the factors that led courts, in each country, first to focus on the ISPs among the different actors of the Web, and second to formulate similar standards of assessment of their liability.¹³ Part II also describes the legislative creativity that first appeared in the United States and then came to the European Union and France. The frameworks implemented adopt the general principle of a limited liability of the ISPs in certain conditions.¹⁴ International influences combined with national concerns to structure these statutory and regulatory schemes.¹⁵

9. See generally Ariel Berschadsky, *RIAA v. Napster: A Window Onto the Future Copyright Law in the Internet Age*, J. MARSHALL J. COMPUTER & INFO. L. 755 (2000).

10. Ass'n Union des Etudiants Juifs de France v. Yahoo!, TGI Paris, Nov. 20, 2000, Ord. réf., J.C.P. 2000, Actu., 2219, available at <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.pdf> (last visited 6 Sept. 2001).

11. See *infra* Part I.A.1. and I.A.2.

12. Concerning the U.S. case law, see Weiskopf, *supra* note 5, at 34 (stating that the case law is unclear as to the conditions and grounds required to hold an ISP liable for copyright infringement); see also Douglas B. Luftman, *Defamation Liability for On-Line Services: The Sky Is Not Falling*, 65 GEO. WASH. L. REV. 1071, 1088-98 (1997) (assessing the consistency of online defamation law). Relating to the French case law, see Cyril Rojinsky, *L'approche communautaire de la responsabilité des acteurs de l'internet*, EXPERTISES, Oct. 11, 2000, no. 241, at 297, available at <http://www.juriscom.net/pro/2/resp20001011.htm> (Oct. 2000).

13. Agathe Lepage, *Du sens de la mesure en matière de responsabilité civile sur internet: la loi, la jurisprudence et le fournisseur d'hébergement*, D. 2001, doct.322. For the standards that the French courts have developed, see Lionel Thoumyre, *Responsabilité des hébergeurs: détours et contours de l'obligation de vigilance*, CAHIERS LAMY DROIT DE L'INFORMATIQUE ET DES RÉSEAUX, 127 (July 2000), at 5-9, available at <http://www.juriscom.net/pro/2/resp20000805.htm> (Aug. 5, 2000). For the standards found in the U.S., see Weiskopf, *supra* note 5.

14. Valérie Sédallian, *La responsabilité des prestataires techniques sur Internet dans le Digital Millennium Copyright Act américain et le projet de directive européen sur le commerce électronique*, at <http://www.juriscom.net/pro/1/resp19990101.htm> (Jan. 1999).

15. For France, see Ministère de l'Economie et des Finances, *supra* note 6. For the U.S., see Carothers, *supra* note 3, at 943.

Part III stresses salient differences between both systems. Substantial and fundamental divergences exist, as illustrated by the issue of illicit content on the Web and the *Yahoo!* case.¹⁶

The conclusive part of this Note shows that in some respects, this outcome calls for harmonization. The French and U.S. legislatures, however, have respectively decided that French general law and the common law in the U.S. should still govern ISP liability. Since French and U.S. substantive laws are different, a uniform definition of ISP liability is illusory. However, uniformity is also unnecessary. What really matters is whether ISPs can easily assess the legal risks of operating business in France and/or in the United States in order to make informed decisions about their business strategies. A uniform definition of conflict of jurisdiction rules, narrowly tailored to ISPs and limiting extraterritorial jurisdiction, could be a solution.¹⁷ Another solution, more feasible, would be a common definition of safe harbors limiting the risk of damaging and unexpected exposure to differences in national substantive laws. A narrowly defined but transversal immunity (regarding all the areas of the substantive law) would make it unnecessary to achieve the illusory goal of harmonizing several bodies of national substantive laws. It would also increase ISPs' incentives to promote self-regulation and technical devices to screen potentially illegal content on the Internet.

I. Background

A. Tradition as Illusion of Permanence: Definition of an Editorial Liability for ISPs

U.S. courts and some French courts have considered the Internet as a new but still ordinary device of mass-communication; thus, they initially assessed ISP liability in comparison to the traditional screening abilities of a publisher or a distributor.¹⁸

1. Common Law Editorial Liability in the United States

Under defamation law, U.S. courts have traditionally held ISPs strictly liable for the defamatory material to which they gave access.¹⁹ This common understanding (or misunderstanding) of the role of an ISP, however, did

16. *Ass'n Union des Etudiants Juifs de France (UEJF) v. Yahoo!*, TGI Paris, May 22, 2000, Ord. Réf., D. 2000, IR172, available at <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000522.htm> (last visited Sept. 6, 2001).

17. The French *Yahoo!* case has provided inspiration to many commentators on this specific point. Jean Eaglesham, *A Lost Connection: A French Decision to Hold Yahoo! Responsible for Allowing Access to Nazi Memorabilia in the US Raises Questions About the Boundaries to Rulings by National Courts*, *FIN. TIMES* (London), Nov. 21, 2000, at 28.

18. Rojas, *supra* note 5, at 1014-18 (1998). For France, see *Halliday v. Lacambre*, CA Paris, 14e ch., Feb. 10, 1999, D. 1999, jur. 389, note N. Mallet-Poujol, available at www.legalis.net/jnet/decisions/illicite_divers/ca_100299.htm (last visited Sept. 6, 2001) (drawing an analogy with the special regulations concerning the press to find the defendant-ISP liable). For an international overview of the jurisprudence dealing with online copyright infringement, see Strowel & Ide, *supra* note 2, at 89-145.

19. Luftman, *supra* note 12, at 1084-85.

not survive under a closer functional examination. The U.S. jurisdictional approach has evolved. The issue of liability was determined by analogy to the print media and depends on the degree to which an ISP controls the content available through its services.²⁰ This new standard made an ISP closer to a distributor than to a publisher; it showed the understanding that an ISP may have no editorial function, merely providing access to information posted on the Web.²¹ As a result, the prevailing rule provides that "commercial on-line services must ascertain the extent to which they can exercise editorial control before being held to a publisher's standard of defamation liability."²² Applications of this standard, however, led to unsatisfactory solutions because of the range of interpretations it allowed.²³ The main obstacle to reaching a clear-cut solution for ISP liability was the qualification of ISP's role as a publisher rather than as a distributor, which involved a fact-based inquiry.

Far from providing incentive to control contents, whenever an ISP actually exercised or represented that it exercised sufficient control over the contents at issue, courts would hold it to the same standard of liability as a publisher.²⁴ If it exercised no control whatsoever, courts would analogize it to a distributor and would not find liability.²⁵ In *Cubby, Inc. v. Compuserve, Inc.*, Compuserve, an ISP, proposed online information classified by topics.²⁶ The plaintiffs claimed that one of the electronic newsletters that Compuserve made available on its 'Journalism Forum' contained defamatory contents.²⁷ The court held that Compuserve had no opportunity to review the contents of the information it was loading into its system, as its subscribers instantaneously had access to the material uploaded.²⁸ The court concluded that the defendant-ISP was the equivalent of an "electronic library"²⁹ and as such it had "no duty to monitor each issue of every periodical [online publication] it distributes."³⁰ In *Stratton Oakmont, Inc. v. Prodigy Services Co.*, Prodigy, an ISP, proposed several forums, one of which contained defamatory language about Stratton, a securities invest-

20. *Id.*

21. Thourmyre, *supra* note 13, at 6.

22. Luftman, *supra* note 12, at 1088.

23. For instance, compare *Cubby, Inc. v. Compuserve, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991) with *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 23 Med. L. Rptr. 1794 (N.Y. Sup. Ct. 1995). See also Mitchell P. Goldstein, *Service Provider Liability for Acts Committed by Users: What You Don't Know Can Hurt You*, 18 J. MARSHALL J. COMPUTER & INFO. L. 591, 627-32 (2000) (commenting on a "Split in the Courts: Cubby Versus Stratton Oakmont.").

24. *Cubby*, 776 F. Supp. at 137-39; see also *Cunard et al.*, *supra* note 8, at 424 (2000) ("[u]nder traditional standards of liability, publishers are liable for any defamatory content they publish; distributors are liable for defamatory content contained in the materials that they distribute only if they know or have reason to know of the defamatory statement.").

25. *Stratton Oakmont*, 23 Med. L. Rptr. 1794 (N.Y. Sup. Ct. 1995).

26. *Cubby*, 776 F. Supp. at 137-39.

27. *Id.*

28. *Id.* at 137.

29. *Id.*

30. *Id.* at 140.

ment banking firm, and its president.³¹ In contrast to *Cubby*, the court held the ISP liable as a publisher because it used a software program to screen potentially offensive language, exercised editorial control, and represented to the public in numerous newspaper articles that it was indeed screening the contents posted on its bulletin boards.³²

The uncertainty of the rule lies in the amount of control that triggers liability as a publisher. Commentators observed that courts should carry a functional inquiry on the ISP's degree of control and the longevity of the content posted.³³ The bulk of this inquiry is essentially an assessment of the technology an ISP uses to exercise its alleged editorial control, which might lead to inconsistent legal decisions.³⁴ In France, a different kind of inconsistency prevailed.

2. Editorial Liability in France

In France, the case law developed inconsistent answers to whether an ISP has an independent duty to control the contents to which it provides access.³⁵ Many French courts, like U.S. courts, have considered the situation of the ISPs in relation to the legislation applicable to traditional media actors. French scholars, however, drew a different analogy based on the jurisprudence developed to deal with an endemic technology available to the French public since the early 1980s: the *minitel*.³⁶ This telecommunication device appeared in 1978 and allows the French public and professionals to create or to access databases in an interactive way. It is still in use today despite the competition of the Internet. *Minitel* servers (*serveurs*) have a specific address accessible through the phone network (*réseau*). Users of a *minitel*³⁷ can access online commercial services, visit companies' pages (*pages minitel*), operate bank transactions, or even be part of chat forums (*forums de discussion*). The comparison of ISPs to the providers of *minitel* services might have influenced the French courts. As a result, depending on the legal qualification given to Internet communica-

31. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 23 Med. L. Rptr. 1794 (N.Y. Sup. Ct. 1995).

32. *Id.*

33. Luftman, *supra* note 12, at 1093-98 (stating that the *Cubby* court misperceived the ISP's technological capabilities to screen the contents posted on its space).

34. *Id.*

35. Compare *Halliday v. Lacambre*, CA Paris, 14e ch., Feb. 10, 1999, D. 1999, jur. 389, note N. Mallet-Poujol, available at www.legalis.net/jnet/decisions/illicite_divers/ca_100299.htm (last visited Sept. 6, 2001), and *Société Multimania v. Lacoste*, CA Versailles, 12e ch., June 8, 2000, D. 2000, IR 270, available at <http://www.juriscom.net/txt/jurisfr/img/caversailles20000608.htm> (last visited Sept. 6, 2001) with *SA Electre v. SARL TI Communication*, T. Com. Paris, May 7, 1999, at <http://www.juriscom.net/txt/jurisfr/da/tcparis19990507.htm> (last visited Sept. 6, 2001), and *Axa v. Infonie*, TGI Puteaux, Sept. 28, 1996, at http://www.legalis.net/jnet/decisions/diffamation/jug-ti-puteaux_280999.htm (last visited Sept. 6, 2001).

36. Lionel Thoumyre, *Responsabilités sur le Web: une histoire de la réglementation des réseaux numériques*, at <http://www.lex-electronica.org/articles/v6-1/thoumyre.htm> (last visited Jan. 10, 2001).

37. Videographic terminal composed of a keyboard and a screen specifically designed to access the *minitel* services.

tions, different fragmented laws are applicable. For instance, Internet communications can be qualified as press publications (*publication de presse*) or as audio-visual communications (*communications audiovisuelles*).³⁸ Other uncertainties appeared in the French case law.

In *Lefébure v. Lacambre*, the *Tribunal de Grande Instance* ("TGI") of Paris found that ISPs were independently liable if they failed to check the content of the information loaded to their space to make sure that their content did not conflict with decency and third parties' rights.³⁹ On appeal, the *Cour d'Appel* of Paris (appellate court) confirmed the liability of the ISP that allowed private (and nude) pictures of the French top model Estelle Halliday to be posted on its space without authorization.⁴⁰ In a similar context, however, the *Tribunal de Commerce* of Paris stated that an ISP had no duty to check the content of such information, and therefore incurred no independent liability for leaving loaded on its space defamatory information of which it was not aware.⁴¹ A few months later, the TGI of Puteaux also refused to find an ISP liable in a case whose main facts were similar to the ones of the U.S. *Cubby* case.⁴² The corporate plaintiffs claimed that the ISP left posted defamatory allegations about them.⁴³ The TGI of Puteaux refused to find the ISP liable since the subscribers' files posted were automatically and instantaneously made available to users, which made it impossible to conduct an *a priori* check of the contents.⁴⁴ Nonetheless, in *Lacoste v. Société Multimania*, the TGI of Nanterre defined a three-fold obligation for ISPs: (1) an obligation to inform the people using its space of the rights of third parties; (2) an obligation to use reasonable means to screen contents illegal on their face; and (3) an obligation to react in order to evict illegal contents.⁴⁵ This case concerned the unauthorized

38. Rojinsky, *supra* note 12. Articles 93-2 and 93-3 of the law no. 85-1317 of Dec. 13, 1985 (modifying the law no. 82-625 of July 29, 1982), J.O., Dec. 1985; JCP 1985, III, 58022; the law no. 86-1067 of December 30, 1986, J.O., Oct. 1, 1986; JCP 1986, III, 59250; and the law of July 29, 1881 concerning the *liberté de la presse* offer the legal combination applicable to ISPs. CODE CIVIL, App., p. 1813 (2000 ed., Code Dalloz 2000).

39. *Lefébure v. Lacambre*, TGI Paris, June 9, 1998, at http://www.legalis.net/cgi-iddn/french/affiche-jnet.cgi?droite=internet_responsabilite.htm (last visited Sept. 6, 2001); *accord* *Lacoste v. Société Multimania*, TGI Nanterre, Dec. 8, 1999, J.C.P. 1999, II, 10279, note F. Olivier, E. Barbry. Third-parties' rights encompass *subjective rights* like the right to privacy or the right to control one's image, for instance.

40. *Halliday v. Lacambre*, CA Paris, 14e ch., Feb. 10, 1999, D. 1999, jur. 389, note N. Mallet-Poujol, available at www.legalis.net/jnet/decisions/illicite_divers/ca_100299.htm (last visited Sept. 6, 2001).

41. *SA Electre v. SARL TI Communication*, T. Com. Paris, May 7, 1999, at <http://juriscom.net/txt/jurisfr/da/tcparis19990507.htm> (last visited Sept. 6, 2001).

42. *Axa v. Infonie*, TGI Puteaux, Sept. 28, 1996 (finding that the ISP has no means to control the content posted before it is made available to users), at http://www.legalis.net/jnet/decisions/diffamation/jug_ti-puteaux_280999.htm (last visited Sept. 6, 2001).

43. *Id.*

44. *Id.* For the facts of *Cubby*, see Part I.A.1.

45. *Lacoste v. Société Multimania*, TGI Nanterre, Dec. 8, 1999, J.C.P. 1999, II, 10279, note F. Olivier, E. Barbry (holding that "the ISP has a general obligation of cautiousness and diligence. It has the responsibility to take the necessary precautions to

online display of nude pictures of a model that Multimania hosted.⁴⁶ On appeal, the *Cour d'Appel* of Versailles gave a more accurate definition of the obligation of vigilance. The court stated that an ISP has no obligation to check systematically the substance of the contents posted; it has only to check when, while operating its technical tasks, it incidentally comes to suspect that the material posted is illegal.⁴⁷ In these inconsistent cases, as in the United States, a determinative factor has been the courts' varying assessments of the ISPs' screening ability. As a result, the legal situation of ISPs is unclear.⁴⁸ Moreover, in a recent decision, the TGI of Paris focused on the conduct and good faith of the defendant-ISP once the judicial authority had put it on notice of the defamatory content posted by one of its subscribers to assess its liability.⁴⁹ This approach does not make clearer the standard of evaluation of ISP liability in France. Uncertainties also prevailed for online copyright infringements, both in the United States and in France.

B. ISP Liability for Copyright Infringement

1. *Artificial Distinctions and Confusion in the United States*

In the United States, courts used three different theories to hold an ISP liable for copyright infringement: direct liability, vicarious liability, and contributory liability.⁵⁰ A defendant-ISP is liable on the ground of direct liability if it produces copies of a protected work that are substantially similar to the original.⁵¹ This triggers strict liability.⁵² Courts find vicarious liability when the defendant-ISP has the right and ability to control the direct infringer's acts and when it receives a direct financial benefit from the infringement.⁵³ Finally, courts find contributory infringement if the defendant-ISP knows of the infringing activity and substantially partici-

prevent the infringement of third parties' rights and it has to take reasonable measures of information, vigilance, and action.").

46. *Id.*

47. *Société Multimania v. Lacoste*, CA Versailles, 12e ch., June 8, 2000, D. 2000, IR 270, available at <http://www.juriscom.net/txt/jurisfr/img/caversailles20000608.htm> (last visited Sept. 6, 2001); see also Thoumyre, *supra* note 36.

48. Thoumyre, *supra* note 36.

49. *SA Ciriél v. SA Free*, TGI Paris, Feb. 6, 2001 (holding that an ISP is not liable for defamatory content posted by subscribers when it has promptly and in good faith removed access to the Web site at stake once the judicial authority asked the ISP to do so.), at <http://juriscom.net/txt/jurisfr/cti/tgiparis20010206.htm> (last visited Sept. 6, 2001).

50. *Religious Tech. Ctr. v. Netcom On-Line Communication Serv., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995) (discussing the liability of an ISP on the grounds of direct, contributory and vicarious liability); see also Cunard et al., *supra* note 8, at 390-400. For a discussion of the comparative merits of these theories see Wendy M. Melone, *Note: Contributory Liability for Access Providers: Solving the Conundrum Digitalization Has Placed on Copyright Laws*, 49 FED. COMM. L.J. 491 (1997).

51. *Religious Tech. Ctr.*, 907 F. Supp. at 1367; see also Burke Sylva, *supra* note 6, at 225.

52. Rojas, *supra* note 5, at 1020-21.

53. *Religious Tech. Ctr.*, 907 F. Supp. at 1375; see also Burke Sylva, *supra* note 6, at 225-26.

pates in it.⁵⁴ The contours of these theories are unclear due to artificial fact-based distinctions that appeared in numerous cases.⁵⁵

First, the direct liability theory is uncertain as applied to online infringements. Protected works transmitted via the Internet are copies under copyright legislation.⁵⁶ However, the very nature of the data transmission through the Internet makes this qualification unclear from the outset.⁵⁷ When subscribers download information from the Internet, the information automatically copies on the random access memory (RAM) of their computers without intervention of an ISP.⁵⁸ The key issue is whether courts should require volition to hold ISPs liable for direct infringement. Although some courts answered in the negative,⁵⁹ most follow the landmark decision⁶⁰ of the Northern District of California in *Religious Technology Center v. Netcom On-Line*.⁶¹ In *Religious Technology*, the court held that ISPs are not direct infringers when they do not perform volitional acts.⁶² In that case, a third party had posted infringing copies of texts by Ron Hubbard, which had automatically created temporary copies of them on the ISP's server.⁶³ The court gave practical reasons why it would be unreasonable to hold ISPs liable for copies ordered by users.⁶⁴ Another court found, however, that a program which automatically selects adult-oriented contents from different Web sites and then posts them on the Web site of an ISP triggers direct infringement.⁶⁵ As a result, the volitional requirement is clumsy and courts have already stretched it in opposite directions.⁶⁶ For instance, in *Playboy Enterprises v. Frena*, the court held directly liable a Bulletin Board Service operator (BBS).⁶⁷ Although the defendant alleged that its subscribers were the ones responsible for uploading the pictures and that it had no knowledge of the copyright infringement,⁶⁸ the court found the ISP liable for displaying Playboy's copyrighted

54. *Religious Tech. Ctr.*, 907 F. Supp. at 1373; see also Burke Sylva, *supra* note 6, at 225-26.

55. Goldstein, *supra* note 23, at 593 ("[b]ecause the standard of liability in this area is uncertain, Internet and online service providers have no assurances that they will be protected.").

56. *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518-19 (9th Cir. 1993) (holding that "the loading of software into the RAM creates a copy under the Copyright Act.").

57. Weiskopf, *supra* note 5, at 19.

58. *Id.* at 19-20.

59. *Playboy Enters. v. Frena*, 839 F. Supp. 1552, 1559 (M.D. Fla. 1993).

60. 907 F. Supp. 1361, 1368-70 (N.D. Cal. 1995).

61. Weiskopf, *supra* note 5, at 21-25; see also Ian C. Ballon & Keith M. Kupferschmid, *Third Party Liability Under the Digital Millennium Copyright Act: New Liability Limitations and More Litigation for ISPs*, 3 CYBERSPACE LAW. 3 (1998), at LEXIS, Law Reviews and Bar Journals Library.

62. *Religious Tech. Ctr.*, 907 F. Supp. at 1369-74.

63. *Id.* at 1368-69.

64. *Id.* at 1369-70.

65. *Playboy Enters. v. Webbworld, Inc.*, 991 F. Supp. 543, 553 (N.D. Tex. 1997).

66. Cunard et al., *supra* note 8, at 398-99 (referencing cases that ruled differently on ISP's direct liability).

67. *Playboy Enters. v. Frena*, 839 F. Supp. 1552, 1556-57 (M.D. Fla. 1993).

68. *Id.* at 1554, 1558.

photographs on its BBS.⁶⁹ This ruling is clearly distinct from the one in *Religious Technology*.⁷⁰

Second, vicarious liability is imprecise with respect to the requirements of ability to control and of direct benefit. Two leading cases dealt with the question of ISP liability when a subscriber infringes a copyrighted work: *Religious Technology*⁷¹ and *Marobie-FL, Inc. v. National Association of Fire Equipment Distributors*.⁷² In *Religious Technology*, Erlich, the direct infringer, contracted with Klemesrud to post his content on the latter's Bulletin Board;⁷³ Klemesrud had contracted with Netcom, an ISP, to gain access to the Internet.⁷⁴ The plaintiff sued Netcom for the infringements of its subscriber's customer (Erlich) who allegedly posted copyrighted texts.⁷⁵ In *Marobie*, the plaintiff sued the ISP because its subscriber allegedly posted copyrighted images on a Web page.⁷⁶ Both District Courts reached the same outcome and limited ISP liability under the vicarious liability theory.⁷⁷ Both courts considered the issue of the degree of supervision that ISPs are able to exercise over their subscribers' contents and concluded that technology permitted supervision, albeit limited.⁷⁸ In addition, both courts concluded that ISPs which bill their subscribers a flat fee service do not directly benefit from the infringing activity.⁷⁹ Therefore, they did not find vicarious liability, as the plaintiff failed to prove that the ISP directly benefited from the infringements.⁸⁰ In so doing, these courts have taken the view that the ISP-subscriber relation is equivalent to the landlord-tenant relation.⁸¹

However, the binding effect of these decisions is weak,⁸² as those decisions did not make clear the level of control that would result in the liabil-

69. *Id.* at 1556-57.

70. One commentator noticed that contrary to the ISP in *Religious Technology*, Frena directly benefited from the infringing activity and that the true infringer was unknown. Goldstein, *supra* note 23, at 598. However, the classical definition of direct liability for copyright infringement does not refer to the ISP's knowledge and alleged direct benefit.

71. *Religious Tech. Ctr. v. Netcom On-Line Communication Serv., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995).

72. *Marobie-FL, Inc. v. Nat'l Ass'n of Fire Equip. Distribs.*, 983 F. Supp. 1167 (N.D. Ill. 1997).

73. *Religious Tech. Ctr.*, 907 F. Supp. at 1367-68.

74. *Id.*

75. *Id.* at 1365-66.

76. *Marobie-FL, Inc.*, 983 F. Supp. at 1171-72.

77. *Marobie-FL, Inc.*, 983 F. Supp. at 1179; *accord Religious Tech. Ctr.*, 907 F. Supp. at 1376-77.

78. *Marobie-FL, Inc.*, 983 F. Supp. at 1179; *accord Religious Tech. Ctr.*, 907 F. Supp. at 1376-77.

79. *Marobie-FL, Inc.*, 983 F. Supp. at 1179; *accord Religious Tech. Ctr.*, 907 F. Supp. at 1376-77.

80. *Marobie-FL, Inc.*, 983 F. Supp. at 1179; *accord Religious Tech. Ctr.*, 907 F. Supp. at 1376-77.

81. Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEO. L.J. 1833, 1844 (2000).

82. *Id.* at 1849-52.

ity of an ISP under the vicarious liability theory.⁸³ First, two different approaches of the notion of "control" can lead to a distinct standard of liability for ISPs. Under the "actual-control" approach, there is no control for vicarious liability purposes so long as a defendant cannot "take meaningful steps to prevent infringement."⁸⁴ In contrast, under the "legal control" approach, "[a]ny evidence of legal control, via contract, agency, or even control unrelated to the infringement, opens the door to a finding of vicarious liability."⁸⁵ This difference is a factor of confusion.⁸⁶ Second, some courts could analogize ISPs to dance-hall owners rather than to landlords, which in contrast would expand ISP liability.⁸⁷ Usually, a landlord is not liable for the copyright infringements of her tenant when the former has no knowledge of the wrongs, has no supervision over those, and does not benefit from the infringing activity.⁸⁸ In contrast, a dance hall proprietor is liable for the wrongdoings of a band that illegally performs copyrighted works in the dance hall, as it benefits the proprietor.⁸⁹ Moreover, just like a landlord, an ISP that has knowledge of the infringing activity may risk liability if it remains passive.⁹⁰ One commentator remarked that "[n]umerous opinions consider dance-hall proprietors vicariously liable for copyright infringement committed by performers while excusing landlords from liability for the acts of their tenants."⁹¹ Third, courts gave more or less stringent definitions of the legal definition of "direct benefit." For instance, in *Fonovisa*, the Ninth Circuit defined "direct benefit" in a liberal way so that any benefit accruing from the visits of customers interested in the infringing material and paying an admission fee is a "direct financial

83. Charles S. Wright, *Actual Versus Legal Control: Reading Vicarious Liability for Copyright Infringement Into the Digital Millennium Copyright Act of 1998*, 75 WASH. L. REV. 1005, 1021-22 (2000) (noting that "[i]none of the few cases that have ruled on online vicarious liability in general have provided a definition of 'control,'" and that neither *Religious Technology*, nor *Marobie* have clarified this issue.).

84. *Id.* at 1013.

85. *Id.* at 1016.

86. *Id.* at 1020 (noting the split among circuits over the notion of "control").

87. Yen, *supra* note 81, at 1849-73; see also Weiskopf, *supra* note 5, at 36-37 (noting that "[c]ourts have struggled to clearly define what circumstances constitute sufficient 'ability to control' in the online context in order to impose vicarious liability.").

88. Goldstein, *supra* note 23, at 606.

89. *Id.*; see also Wright, *supra* note 83, at 1011 (stating that "[f]irst, the so-called 'landlord-tenant' cases absolved a landlord of responsibility for the infringing activities of a tenant if the landlord lacked notice of the infringement at the creation of the lease. In contrast, the 'dance-hall' cases attached liability to proprietors of entertainment venues for the infringing performances of musical compositions by bands and orchestras.").

90. Goldstein, *supra* note 23, at 608.

91. Yen, *supra* note 81, at 1844-45 (stating that dance hall owners meet: (1) the requirement of supervision since they own the premise where the infringing activity takes place and are able to prevent it; (2) the requirement of direct benefit since they receive payment from the admission of patrons who want to attend the infringing activity); see also Goldstein, *supra* note 23, at 606 ("The cases are legion which hold the dance hall proprietor liable for the infringement of copyright resulting from the performance of a musical composition by a band or orchestra whose activities provide the proprietor with a source of customers and enhanced income.").

benefit.”⁹² Therefore, the aftermath of *Religious Technology* and *Marobie* is still difficult to ascertain.⁹³ Despite these decisions, one commentator even stated that “Internet operations are at a high risk of being found vicariously liable for infringing activities occurring on their networks.”⁹⁴

Finally, the lack of precision for the definition of the requirement of knowledge of the infringing activity may affect the use of contributory liability.⁹⁵ In *Sega Enterprises v. MAPHIA*, the court focused on whether the ISP-defendant had actual knowledge of the infringements to hold it liable.⁹⁶ In fact, the ISP had actual knowledge and even encouraged the posting of pirated copies of copyrighted video games on its Web site to be later downloaded by other subscribers.⁹⁷ The court held the ISP would likely be found both directly and contributorily liable.⁹⁸ However, facts do not always demonstrate an ISP’s actual level of knowledge. The leading case, *Religious Technology*,⁹⁹ dealt with the issue of an ISP that had no actual knowledge of the infringing activity. The court held that an ISP obtains sufficient knowledge for contributory liability purposes upon notification of the infringing activity and where the ISP has no reason to suspect a colorable claim of non-infringement.¹⁰⁰ Even without being on notice, an ISP also has a duty to make some search, for instance, by use of search engines on key words that would help to reveal conspicuous infringements.¹⁰¹ Nonetheless, the definition of “colorable claim of non-infringement” remains vague.¹⁰² It just substitutes the issue of the level of an ISP’s knowledge with the issue of the level of conspicuousness of alleged infringements.¹⁰³ Moreover, one author noted that some courts may hold ISPs to have constructive knowledge of infringements because they provide

92. *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 263-64 (9th Cir. 1996) (stating that a revenue accruing from the visits of customers interested in the infringing material and paying an admission fee is a “direct financial benefit”).

93. Yen, *supra* note 81, at 1849-72 (providing a thoughtful discussion of the case law concerning vicarious liability for copyright matters and analogies with ‘dance-hall’ cases).

94. Weiskopf, *supra* note 5, at 38.

95. Depending on the court, a *material* or *substantial* contribution to the infringing activity is also required. However, the majority of courts admit that supplying Internet facilities can be sufficient to meet this requirement. Weiskopf, *supra* note 5, at 30-32 (discussing the issue of ISPs’ participation in the infringing activity); *see also* Rojas, *supra* note 5, at 1026-27 (giving examples of cases holding that supplying facilities to carry on the infringing activity is sufficient contribution for purposes of contributory liability). For a general discussion, *see* Goldstein, *supra* note 23, at 602-06.

96. *Sega Enters. v. MAPHIA*, 857 F. Supp. 679, 686-87 (N.D. Cal. 1994).

97. *Id.*

98. *Id.* The court subsequently granted Sega both summary judgment and an injunction, holding the ISP-defendant liable for copyright infringement. *Sega Enters. v. MAPHIA*, 948 F.Supp. 923 (N.D. Cal. 1996).

99. *Religious Tech. Ctr. v. Netcom On-Line Communication Serv.*, 907 F. Supp. 1361 (N.D. Cal. 1995).

100. *Id.* at 1374.

101. *See id.* at 1374-75.

102. *See* Yen, *supra* note 81, at 1876-79.

103. *Id.*

the facilities necessary for the infringing activity.¹⁰⁴ Thus, courts did not clearly articulate the notion of knowledge for contributory liability purposes.

2. *A Famous Illustration of ISP Liability for Third Party Copyright Infringement in the United States: Napster*

The famous *Napster* case illustrates the application of contributory and vicarious liabilities to ISPs.¹⁰⁵ An audio compression technology (MP3) allows audio recordings to be copied onto a computer hard drive. Napster used this technology to:

(1) [M]ake MP3 music files stored on individual computer hard drives available for copying by other Napster users; (2) search for MP3 music files stored on other users' computers; and (3) transfer exact copies of the contents of other users' MP3 files from one computer to another via the Internet.¹⁰⁶

Napster also provided on-line "technical support for the indexing and searching of MP3 files."¹⁰⁷ No copy of digital music was stored or circulated on Napster's server,¹⁰⁸ which made unavailable a claim of direct infringement against Napster. Napster's users who uploaded or downloaded MP3 copies of copyrighted musical works were the direct infringers.¹⁰⁹ Referring to Napster executives' internal documents, the United States District Court for the Northern District of California determined that Napster had actual knowledge of the exchange of pirated music.¹¹⁰ Moreover, the court found that the plaintiff had sent a notice of infringement to Napster.¹¹¹ On appeal, the Ninth Circuit found that Napster actually knew that its users pirated specific musical works and failed to remove access to these files.¹¹² In addition, the District Court found that Napster "suppl[ie]d the proprietary software, search engine, servers, and means of establishing a connection between users' computers,"¹¹³ which amounted to a material contribution to the infringing activity.¹¹⁴ Thus, the court concluded that Napster was more likely than not contributorily liable.¹¹⁵ The Ninth Circuit confirmed this conclusion.¹¹⁶

The court further determined that Napster had "the right and ability to supervise its users' infringing conduct"¹¹⁷ and that it had a direct bene-

104. Weiskopf, *supra* note 5, at 29-30.

105. A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff'd in part, rev'd in part*, 239 F.3d 1004 (9th Cir. 2001).

106. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1011 (9th Cir. 2001).

107. *Id.*

108. 114 F. Supp. 2d at 905-08.

109. *Id.* at 911.

110. *Id.* at 917.

111. *Id.*

112. 239 F.3d at 1022.

113. 114 F. Supp. 2d at 920.

114. *Id.*

115. *Id.*

116. 239 F.3d at 1021, 1022.

117. 114 F. Supp. 2d at 921.

fit in the infringing activity, as it expanded its user base in order to generate and increase future revenues.¹¹⁸ Thus, the court concluded that Napster was also more likely than not to be vicariously liable.¹¹⁹ The appellate court also affirmed this conclusion.¹²⁰ This case is a straightforward illustration of ISP contributory and vicarious liability for on-line copyright infringement. However, it does not mean that the application of those theories is without uncertainties, as discussed above. Under the facts of *Napster*, there may not have been difficulty in proving the ISP's actual knowledge of its users' infringing activity and its direct benefits. However, this case did not clearly address the question of the kind of control required to find an ISP liable on the ground of contributory liability.

3. *France: General Law*¹²¹ *Approach and Case Law Loophole*

In France, both civil and penal liabilities could concern ISPs.¹²² Civil liability of ISPs is based on articles 1382 and 1383 of the French Civil Code and French courts have already invoked it for ISPs.¹²³ Those provisions are broad and French courts have used them both for violations of privacy, illicit content and copyright infringement. For ISPs, penal liability could be based on articles 121-6 and 121-7 of the French Penal Code but there is no record of courts using this hook for ISPs.

a. ISP Liability for Copyright Infringement Under the French Civil Code

Article 1382 of the French Civil Code states that "anyone who, through her act, causes damage to another by her fault shall be obliged to compensate the damage."¹²⁴ Article 1383 of the French Civil Code goes further and provides that "everyone is responsible for the damage caused not only by her own act but also by her negligence or carelessness."¹²⁵ These articles state basic principles of the general law and are applicable to ISPs.¹²⁶ In particular, article 1382 applies to Internet Access Providers and article 1383 best applies to ISPs.¹²⁷ In *Lacoste*, the TGI of Nanterre based the quasi-editorial duties of ISPs on article 1383 of the French Civil Code; the

118. *Id.* at 921-22.

119. *Id.* at 922.

120. 239 F.3d at 1024.

121. *Droit commun* in French.

122. See generally Thoumyre, *supra* note 13.

123. Lefebure v. Lacambre, TGI Paris, June 9, 1998, at http://www.legalis.net/cgi-iddn/french/affiche-jnet.cgi?droite=internet_responsabilite.htm (last visited Sept. 6, 2001); accord *Lacoste v. Société Multimanía*, TGI Nanterre, Dec. 8, 1999, J.C.P. 1999, II, 10279, note F. Olivier, E. Barbry.

124. CODE CIVIL [C. CIV.] art. 1382 (Fr.) ("Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer.")

125. C. CIV. art. 1383 (Fr.) ("Chacun est responsable du dommage qu'il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence.")

126. Thoumyre, *supra* note 13.

127. Other solutions could be based on Articles 1384 through 1386 of the French Civil Code relating to the liability for other persons, things or animals under one's supervision or guardianship.

court merely put ISPs' obligations of vigilance, action and information under the scope of the *droit commun*.¹²⁸ The application of this solution might entail an obligation of inspection rather than of vigilance, which would expand the duties of ISPs and seriously burden their tasks.¹²⁹ The *Cour d'Appel* of Versailles seemingly limited this requirement.¹³⁰ Referring to the *Cour d'Appel*, the control of the contents does not need to be systematic. The ISP will have to operate this check spontaneously only in case it has actual knowledge or is informed of the illicit content of a Web site or when the ISP comes to suspect illegality of content while performing its ordinary tasks on the Web site at stake.¹³¹ This attitude amounts to the controversial and yet vague *diligences appropriées*¹³² that might lead an ISP to shut down an illicit Web site.¹³³ This type of liability based on the general law is added to the ISP's editorial liability, leaving its legal status unclear.¹³⁴

French courts had already found liability for copyright infringements on the Internet. However, those decisions only concerned the direct liability of subscribers and did not concern ISPs.¹³⁵ In 1999, the *Tribunal de Commerce* of Paris refused to hold IAPs liable for the copyright infringements found on a Web site they only provided an hyperlink to, without providing any further services to the direct infringers.¹³⁶ In 2000, the *TGI* of Paris found liable under Article 1382 of the French Civil Code a hosting service provider (*hébergeur*) for the copyright infringements of a sub-

128. *Lacoste v. Société Multimania*, TGI Nanterre, Dec. 8, 1999, J.C.P. 1999, II, 10279, note F. Olivier, E. Barbry. *Droit Commun* is the general law applicable to anybody (save if people fall under a clearly defined exception).

129. *Id.* (holding that defendant ISP should have used a research engine based on a limited number of key words that evoke, for example, the universe of nudity, beauty, and fame to notify the author of the infringements, or even to strike down the apparently illegal Web site.).

130. *Société Multimania v. Lacoste*, CA Versailles, 12e ch., June 8, 2000, D. 2000, IR 270, available at <http://www.juriscom.net/txt/jurisfr/img/caversailles20000608.htm> (last visited Sept. 6, 2001).

131. *Id.*

132. Roughly translated as "proper remedial actions".

133. Thoumyre, *supra* note 13, at 4-5.

134. Thoumyre, *supra* note 36.

135. *Art Music v. ENST*, TGI Paris, Aug. 14, 1996 (holding two students liable under copyright law because they had posted copyrighted works of singers Brel and Sardou on their personal Web pages), at <http://www.celoq.fr/expertises/refere.htm> (last visited Sept. 6, 2001); *accord Queneau v. Leroy*, TGI Paris, May 5, 1997, J.C.P. 1997, II, 22906 (holding liable under copyright law the author of a Web site who had made available online a copyrighted text of R. Queneau), available at http://www.legalis.net/jnet/decisions/dt_auteur/ord_0597.htm (last visited Sept. 6, 2001); *SNC Prisma Press v. Vidal*, TGI Paris, Feb. 13, 2001 (holding liable the authors of Web pages who had reproduced copyrighted articles of French magazines), available at http://www.legalis.net/jnet/decisions/dt_auteur/jug_tgi_paris_130201.htm (last visited Sept. 6, 2001).

136. *Groupe Revue Fiduciaire v. EDV*, T. Com. Paris, Jan. 1, 1999 (holding that the defendants-IAPs were not liable for the unlicensed reproduction of copyrighted articles found on a Web site they provided an hyperlink to), at <http://www.afa-France.com/htm/action/jugement2.htm> (last visited Sept. 6, 2001).

scriber.¹³⁷ The court decided that the defendant-ISP could not have ignored that the domain name and the Internet address of its subscriber were mere reproductions of the notorious *Calimero* trademark when it accepted to host the Web site.¹³⁸ In this case, the court considered that the ISP had the ability to decide not to host a clearly infringing Web site from the outset and nonetheless accepted to host the Web site at stake, thus allowing a subscriber to pursue its on-line infringement. Therefore, the holding of this case is limited to specific facts when the ISP actually and knowingly decides to provide the facilities for the infringing activity.

Finally, in 2001, the TGI of Paris had again an opportunity to assess the liability of an ISP for the copyright infringement of a subscriber. In *Perathoner v. Pomier*, Joseph Pomier, the subscriber, posted a recording of the copyrighted musical work *Ushuaïa* on his Web site.¹³⁹ The court refused to hold the ISP liable under Article 1384 of the French Civil Code, as it determined that neither was Free (the ISP) the guardian of the computers on which the data that allowed the infringement to take place were stored, nor had Free the direction, use or control over the Web site at stake.¹⁴⁰ In this case, Free did not act as a hosting service provider; it only provided an hyperlink to the infringing Web site and nothing more.¹⁴¹ Then, the court focused on whether Free had been at fault for imprudence to explore its potential liability under Article 1382 and 1383 of the French Civil Code.¹⁴² The court found that Free had warned its subscriber that some data transmitted via the Internet may be copyrighted when they entered their contractual relationship, and that Free had also promptly removed access to the infringing Web site once on notice of infringement.¹⁴³ Thus, referring to this holding, an ISP escapes liability for its subscribers' wrongs when it: (1) acts cautiously with its subscribers by informing them of the risks of copyright infringement on the Internet and, (2) promptly removes access to infringing Web sites once on notice of infringement. This 'standard of cautiousness' is not detailed in the court's decision. Moreover, under the facts of this case, this holding may well apply only to IAPs, as the defendant only provided an hyperlink to the infringing Web site.

137. *Cons. P. v. Monsieur G.*, TGI Paris, Mar. 24, 2000, *Gaz. Pal.*, no. 21, at 42-43, note Matthyssens (2001) (holding that even though there is no presumption that the ISP knows the content of all the Web sites it hosts, under the facts of the case, the defendant-ISP could not ignore the copyright infringements of its subscriber), at http://juris-com.net/cgi-iddn/french/affiche-jnet.cgi?droite=internet_dtauteur.htm (last visited Sept. 6, 2001).

138. *Id.*

139. *Perathoner v. Pomier*, TGI Paris, May 23, 2001, available at http://www.legalis.net/jnet/decisions/dt_auteur/jug_tgi_paris_230501.html (last visited Sept. 6, 2001). Note that the court held that the French law on ISP liability enacted in August 1, 2000 and the European Union Directive on E-commerce of June 8, 2000 were not applicable. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

Under this case law, it is unclear how a French court would decide a case like *Napster*. A court would certainly find Napster's users liable under French copyright law.¹⁴⁴ However, no French court held an ISP liable for the acts of its users without finding a fault or imprudence of the ISP itself. Under the facts of *Napster*, a French court should explore liability of the ISP under Article 1382 of the French Civil Code. Referring to *Cons. P. v. Monsieur G.* and the specific technology and software that Napster developed to share audio recordings on the Internet, a French court might find Napster liable for continuing to provide the facilities to users although it had actual knowledge of specific infringements. The "cautiousness approach" found in *Perathoner v. Pomier* offers another possibility to find Napster liable, as a plaintiff had put Napster on notice of various and specific infringements, and still Napster did nothing to remove access to the infringing files. Of course, those cases have no binding authority in France and the likely solution there is far from certain.

b. The Still Unexplored Application of Penal Complicity to ISPs

An ISP could also fall under the provisions of the French Penal Code that deal with complicity.¹⁴⁵ Article 121-7 states that "a person who knowingly facilitates the preparation or the realization of a crime or of a tort, by providing her help or assistance, is an accomplice for this crime or tort."¹⁴⁶ Article 121-6 provides that the accomplice is to be punished as author of the wrong.¹⁴⁷ In the case of a pure Internet Access Provider, however, its participation is not material to the infraction (as it provides a connection to its subscribers, not to the direct infringer), and it does not necessarily have the requisite *mens rea*¹⁴⁸ (either if it is not aware of the wrong or, if aware, if it does not have the technology to stop the display of the illicit content).¹⁴⁹ In the case of an ISP, the mere supply of a space to upload information might qualify as participation to the infraction.¹⁵⁰ The remaining question is then the existence of the requisite *mens rea* of ISPs. ISPs' subscribers can modify the contents posted without any intervention of the former and are not required to inform them of these operations.¹⁵¹ Therefore, ISPs might not be aware of illicit contents posted by their subscribers. The only hypothesis in which the ISP could have the requisite

144. Under Article 122-4 of the Intellectual Property Code of France (*Code de la Propriété Intellectuelle*) any performance or reproduction, partial or in its integrity, of a protected work without the consent of the author is illegal. CODE DE LA PROPRIÉTÉ INTELLECTUELLE art. 122-4 (Fr.).

145. See Sébastien Canevet, *Fourniture d'accès à l'Internet et responsabilité pénale*, at <http://www.canevet.com/doctrine/resp-fai.htm> (last visited Sept. 6, 2001).

146. CODE PÉNAL [C. PÉN.] art. 121-7 (Fr.) (providing that "[o]ne should be deemed an accomplice to a crime or delict when one knowingly, by help or assistance, facilitated its preparation or accomplishment.").

147. C. PÉN. art. 121-6 (Fr.) (providing that "an accomplice to the crime or delict under article 121-7 should be punished as the author of the crime or delict").

148. That is to say the requisite state of the mind under the penal law.

149. Canevet, *supra* note 145.

150. *Id.*

151. *Id.*

mens rea is when it is aware of an infraction that persists (*infraction continue*).¹⁵²

Obviously, each country developed independent case law solutions that look similar. Among the numerous actors¹⁵³ that intervene on the Internet, U.S. and French courts chose to single out ISPs and tailored standards to assess their liability; courts sometimes went further and defined affirmative duties for ISPs.¹⁵⁴ This common approach also characterizes the French and U.S. statutory framework. In this respect, however, similarity derives from interesting direct and indirect interrelations.

II. Interrelated Developments of Similar Statutory Solutions

To understand the reasons that led to similar statutory solutions, it is necessary to realize that both the French and the U.S. legislatures started at the same point. In each country, the case law had autonomously developed similar analysis of ISP liability, as presented above. This section analyzes the common underlying factors that led U.S. and French judges to the same solutions. This section also attempts to determine why the legislatures reacted the same way in both countries.

A. Autonomous Developments and Common Underlying Factors

1. *The Efficiency Argument*

A common focus on ISPs is a consequence both of a general policy choice and of the courts' interpretation of ISPs' position among Internet actors. The general policy choice is one of efficiency since it is reasonably foreseeable that a liability regime should provide ISPs with an incentive for screening content, or to provide their subscribers with technical tools to do so, to avoid liability.¹⁵⁵ The Internet has lowered the cost and traditional physical burden, in terms of necessary facilities, of copying. It has also allowed wrongdoers to be mobile and hard to locate.¹⁵⁶ Thus, it is easier to locate and hold ISPs liable for defamation and copyright infringement than to do so for other actors.¹⁵⁷ One commentator believes that the courts have been sensitive to plaintiffs who stated that ISPs were the "deep pockets" and that

152. *Id.*

153. For a general presentation of the actors and wrongs found on the Internet, see generally Strowel & Ide, *supra* note 2, at 25-32.

154. For France, see *Halliday v. Lacambre* CA Paris, 14e ch., Feb. 10, 1999, D. 1999, jur. 389, note N. Mallet-Poujol, available at http://www.legalis.net/jnet/decisions/illicite_divers/ca_100299.htm (last visited Sept. 6, 2001). See also *Lacoste v. Société Multimania*, TGI Nanterre, Dec. 8, 1999, J.C.P. 2000, II, 10279, note F. Olivier, E. Barbry. For the U.S., see *Religious Tech. Ctr. v. Netcom On-Line Communication Serv.*, 907 F. Supp. 1361, 1374-75 (N.D. Cal. 1995) (noting that ISPs have an obligation to check the existence of a copyright notice in the caption of images posted on the Internet in order to escape liability).

155. For instance, the U.S. legislature affirmed that it was aiming at "remov[ing] disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material." 47 U.S.C. § 230(b)(4) (1996).

156. Rojas, *supra* note 5, at 1016-17.

157. *Id.*

where innocent parties were involved, the one who best could prevent the wrong should bear the consequences.¹⁵⁸

In France, under some circumstances, judges have implicitly considered ISPs as being in the best position to know the identity of the direct author of the wrong.¹⁵⁹ The *Cour d'Appel* of Versailles gave some guidelines for ISPs to comply with their obligations to implement preventive measures; one of these concerned the prohibition of non-identification while contracting with Web pages editors.¹⁶⁰ The *TGI* of Nanterre implicitly noted the privileged position of IAPs to ascertain the actual identity of a Web site editor.¹⁶¹ This proposal is linked to the courts' functional analysis since the *TGI* scrutinized the nature of the functions and ability of the ISP at stake.¹⁶² Courts conclude that ISPs have technical means to prevent and stop on-line wrongs. In both the United States and in France, given this understanding of ISPs' technical ability and their relation to potential direct infringers, imposing liability on ISPs is considered efficient as an incentive to make them screen content.¹⁶³

158. Melone, *supra* note 50, at 495.

159. *Lacoste v. Société Multimania*, *TGI Nanterre*, Dec. 8, 1999, J.C.P. 2000, II, 10279, note F. Olivier, E. Barbry (stating that the assessment of ISPs liability is independent of the presence of the editor of the Web site as a party to the suit and that the defendant-ISP could have obtained the information necessary to the identification of the editor from the IAP). Interestingly, the French legislature tried to improve the availability of data regarding the identity of any person involved in the creation of online content. It imposed ISPs an obligation to collect and to disclose those data to the judiciary, if necessary. Professionals who publish online content also have the duty to make available to the public elements of identification concerning themselves and the ones in charge of the online publication content. However, the French *Conseil Constitutionnel* struck down provisions relating to ISPs duties to remove content once a third-party puts them on notice of the illegality of this content. Law No. 2000-719 of August 1, 2000, arts. 43-7, 43-8, 43-9, 43-10, J.O., August 2, 2000, p. 11903; JCP 2000, *Aperçu Rapide*, 1739; see also Cons. const. No. 2000-433 DC of July 27, 2000, J.O., August 2, 2000, p. 11903; JCP 2000, *Aperçu Rapide*, 1739 (invalidating certain provisions of the above mentioned law).

160. *Société Multimania v. Lacoste*, CA Versailles, 12e ch., June 8, 2000, D. 2000, IR 270, available at <http://www.juriscom.net/txt/jurisfr/img/caversailles20000608.htm> (last visited Sept. 6, 2001).

161. *Union des Etudiants Juifs de France v. Multimania*, *TGI Nanterre*, May 22, 2000 (stating an ISP that provides space can have the adequate IAP communicate the actual identity of its client), available at <http://www.juriscom.net/txt/jurisfr/cti/tgparis20000522.htm> (last visited Sept. 6, 2001).

162. *Id.*

163. On economic grounds, a counterargument would be that imposing liability on ISPs might raise litigation and transaction costs, and thus deter new ISP entrants and make the existing ISPs increase their rates to pass the new costs to their subscribers. However, the deterrence argument lacks foundation if there is no showing of a cost-benefit analysis that would lead to the doubtful conclusion that new costs supersede any opportunity of profits. Moreover, if the market for ISPs is a competitive one, ISPs cannot transfer their new costs to their subscribers, or at least not in their entirety, as subscribers would go to cheaper competitors. Finally, ISPs can also spread the risk of financial loss thanks to insurance funds. These arguments and counterarguments are also classically found in the area of product liability.

2. *The Technical Issue*

The courts' functional analysis naturally focused on the ISP's technical means that would make it possible to implement case law solutions and courts' orders. In *Lacoste*, the TGI of Nanterre noted that ISPs could use search engines and keywords to detect suspect contents.¹⁶⁴ On detection of such contents, the TGI stated that ISPs could and should notify the author of the allegedly wrong content and even shut down the Web site if necessary.¹⁶⁵ On appeal, the *Cour d'Appel* of Versailles confirmed the lower court's decision and further noted that ISPs are able and ought to locate illicit contents to cause their modification or to stop providing their services, if necessary, at the time of performing their contractual obligations.¹⁶⁶

In the U.S., the *Religious Technology* court also stated that ISPs could and should operate some verification.¹⁶⁷ However, whether or not ISPs are able to monitor illicit contents and determine if suspected works amount to infringements,¹⁶⁸ judges, both in France and in the U.S., might overstate ISPs' technical screening abilities.¹⁶⁹ This common focus on ISPs led the French and the U.S. courts to develop a similar standard of assessment for ISP liability based on ISPs' technical ability and good faith in using their tools to screen content.

3. *Common Weaknesses in Assessing ISP Liability*

In both the United States and France, courts developed standards of assessment that share common characteristics: theoretical vagueness and practical weaknesses.¹⁷⁰ They also trigger common challenges for ISPs in both countries. In France, the legal scheme fluctuates between a principle of no liability for ISPs, a presumption of liability, and the usual civil liability

164. *Lacoste v. Société Multimanía*, TGI Nanterre, Dec. 8, 1999, J.C.P. 2000, II, 10279, note F. Olivier, E. Barbry, available at <http://www.juriscom.net/txt/jurisfr/img/caversailles20000608.htm> (last visited Sept. 6, 2001).

165. *Id.*

166. *Id.* (stating that the ISP who provides space has an obligation to locate any sites whose content is illegal, illicit or damaging in order to cause the putting in order of the content or to stop the providing of his services).

167. Weiskopf, *supra* note 5, at 29 (stating that courts found it fair "to impose some level of affirmative verification of the infringing activity on the defendant where facts - like works containing copyright notices posted to the defendant's system - exist, giving rise to a reasonable ability to verify the alleged infringing activity.").

168. Canévet, *supra* note 145 (stating that once an IAP opens a domain for one of his clients, this client is able to freely add, modify, suppress information without notifying the IAP); see also Melone, *supra* note 50, at 497 (stating that "[t]he access provider who provides the gateway to thousands of bulletin board operators, and thus millions of customers, to upload, download, or simply view the infringing material, is only tangentially related to any resulting copyright infringements."); Yen, *supra* note 81, at 1871 (stating that the volume of traffic will make careful consideration of potential infringements a practical impossibility, and that it is hard to determine whether there is infringement or not).

169. Luftman, *supra* note 12, at 1098 (commenting on *Stratton*, and noting that *Stratton* court "failed to identify the limited capabilities of Prodigy's [defendant-ISP] screening software.").

170. See *supra* Part I.

found in *droit commun*.¹⁷¹ In the U.S., depending on whether it earns revenue from a subscriber's infringement, to what degree it has knowledge of an infringing activity or to what degree it exercises a control over the contents, an ISP is at risk of being held liable.¹⁷² In France, legal decisions still fail to determine a clear standard of assessment and the available decisions do not generally adopt a single clear-cut legal rationale.¹⁷³ Both in France and in the U.S., courts drew analogies between ISPs and traditional media actors that led to similar standards of assessment of ISP liability.¹⁷⁴ In both countries ISPs have an editorial liability that is in correlation with the level of editorial control they exercise.¹⁷⁵ In both countries they are liable if they fail to exercise some affirmative verifications upon notice of infringement, or when they have reason to suspect an infringement.¹⁷⁶ Thus, U.S. and French courts use similar legal principles and legal analysis to hold ISPs liable. French courts, however, went further in their definition of ISPs' affirmative duties and U.S. courts are ahead in defining ISP liability for third party wrongs.

Despite this apparent international harmonization, on a national level, the contradictory case law outcomes left ISPs uncertain as to the risks relating to their function. Uncertainty and its foreseeable consequences have provided incentives to the legislatures, both in the United States and in France, to implement statutes and regulations determining the conditions under which an ISP is and is not liable.¹⁷⁷ Noticeably, these similar solutions derive from common weaknesses. Therefore it is important to consider what factors led to these similar case law developments both in France and in the United States.

171. F. Olivier and E. Barbry, Note, *Responsabilité sur Internet: le droit commun, encore et toujours!*, JCP II 10279 (1999).

172. Yen, *supra* note 81, at 1880-81 (providing a summary of the underlying law on copyright infringement); see also Rojas, *supra* note 5, at 1034-35 (stating that a negligence standard of liability for ISPs is emerging that focuses on the reasonableness of ISPs' actions once on notice of infringement); Luftman, *supra* note 12, at 1092-93 (on the consistency of current online defamation law).

173. Thoumyre, *supra* note 36.

174. See *supra* Part I.A.

175. See *supra* Part I.A.; see also Goldstein, *supra* note 23, at 629 (stating that "[a]s a result of Cubby, it appears that BBS operators and OSPs [On-Line Service Providers] can choose their liability by choosing the amount of editorial control that they wish to exercise.").

176. Melone, *supra* note 50, at 499 (noting that courts use this standard for copyright infringement); see also Rojas, *supra* note 5, at 1019 (stating that the "greatest risk for an ISP for defamation liability for third-party content will continue to be in cases where deletion of an offending message is demanded but the ISP refuses to comply."). For France, see *Société Multimania v. Lacoste*, CA Versailles, 12e ch., June 8, 2000, D. 2000, IR 270.

177. For France, see Law No. 2000-719 of Aug. 1, 2000, J.O., Aug. 2, 2000, p. 11903 (modifying the Law No. 86-1067 of Sept. 30, 1986 *On the Freedom of Communication*). In the U.S., see 47 U.S.C. § 230 (1996) and 17 U.S.C. § 512 (1998).

B. Reactive Enactments to the Case Law

1. *Freedom of Speech and Libert  d'Expression Concerns*

Both in the U.S. and in France commentators have stressed the dangers of requiring technical intermediaries to exercise screening for content. ISPs could either try to escape any affirmative duties or exercise a precautionary censorship that would in turn possibly trigger their liability on free speech grounds.

Given the prevailing case law in the U.S., an ISP should charge a flat fee to its subscribers to safely avoid liability for its subscriber's copyright infringements and avoid any screening of content whatsoever.¹⁷⁸ In contrast, when an ISP receives a notice of infringement, it has strong incentives to suspend its services to escape liability, which might lead to censorship.¹⁷⁹ Moreover, a liability based on whether or not an ISP received notification¹⁸⁰ of an alleged wrong may be "a disincentive to engage in self-regulation of content available on [ISPs'] services, because doing so might well provide a would-be plaintiff with a basis to claim that [ISPs] knew or should have known that particular content was tortious."¹⁸¹ This kind of attitude has far-reaching implications for Free Speech matters and could further ISPs' liability in case they unduly burden free expression by removing access to Web sites as a precautionary measure.¹⁸²

French commentators expressed similar concerns and argued that the law should not require ISPs to manage editorial tasks that might convert their laudable vigilance into censorship.¹⁸³ In *Lacoste*, the *Cour d'Appel* of Versailles warned that ISPs' incompetence to determine whether or not contents are illegal and the danger that ISPs abuse their right to screen content (*abus de droit*)¹⁸⁴ should limit their editorial-like affirmative duties.¹⁸⁵ The court also noted that a systematic control by ISPs over the

178. Yen, *supra* note 81, at 1880-81.

179. Patrick J. Carome & Samir Jain, *Immunity From Tort Liability for Online Services: Why the Decision in Zeran v. America Online is Good Public Policy*, 2 CYBERSPACE LAW, 13, 14 (1998) (stating that "imposing liability on interactive service providers for third-party content . . . would, as a practical matter, compel service providers to err on the side of censorship.").

180. Notification has here a broad meaning. ISPs may be notified of defamatory or other tortuous content by conducting their own inquiry, by receiving notification from a third-party, or simply by chance. *Id.*

181. Carome & Jain, *supra* note 179, at 14.

182. Yen, *supra* note 81, at 1869-72; *see also* French Senator Ivan Renan, Address before the French S nat (May 29 and June 27, 2000) (fearing an *a priori* censorship over content), available at http://Senat.fr/s ances/s20000627/s20000627_mono.html (last visited Oct. 10, 2000); French Senator Pierre H risson, Address before the French S nat (May 29 and June 27, 2000) (stating that ISPs can be held liable for unduly shutting down a Web site), available at <http://S nat.fr, Compte rendu de s ance File> (last visited 10 Oct. 2000).

183. Thoumyre, *supra* note 13.

184. This civil law notion refers to a fault that consists in exercising one's right not in furtherance of one's interest but rather in an attempt to harm someone else.

185. *Soci t  Multimania v. Lacoste*, CA Versailles, 12e ch., June 8, 2000, D. 2000, IR 270, available at <http://www.juriscom.net/txt/jurisfr/img/caversailles20000608.htm> (last visited Sept. 6, 2001).

contents may alter the freedom of speech, of creation and of communication.¹⁸⁶ The legislatures also had to tackle the issue of the uncertainty of the case law.

2. Legislatures' Concerns with Case Law Uncertainties

Legislators had to clear uncertainties arising out of the analogies between ISPs and publishers or distributors, and regarding ISP liability for the acts of third parties. In France, Member of Parliament (*député*) Bloche who proposed new enactments on ISP liability made it clear that the controversial case *Halliday v. Lacambre*¹⁸⁷ triggered his legislative action.¹⁸⁸ *Député* Bloche also stressed that the new law would seek to avoid the uncertainty that arose out of the case law.¹⁸⁹ Furthermore, business concerns also motivated the French government's attempt to favor investment in new technologies.¹⁹⁰ Therefore, three factors influenced the French legislative action: uncertainty of the case law on ISP liability, free speech issues and protection of the public,¹⁹¹ and business concerns. These factors also influenced the U.S. legislative action. For instance, the U.S. legislature emphasized that the policy of the United States was:

[T]o encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services; . . . to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.¹⁹²

These factors gave incentives to the legislatures to water down ISP liability under certain conditions.

C. The U.S. and French Statutory Frameworks: Evolution and Comparison

The U.S. framework is a dual one since two different acts govern on the one hand defamation, and on the other hand copyright infringement.

186. *Id.*

187. *Halliday v. Lacambre*, CA Paris, 14e ch., Feb. 10, 1999, D. 1999, jur. 389, note N. Mallet-Poujol, available at http://www.legalis.net/jnet/decisions/illicite_divers/ca_100299.htm (last visited Sept. 6, 2001).

188. Member of Parliament Bloche, Address before the French *Assemblée Nationale*, J.O., June 15, 2000, p. 5471, available at <http://Assemblée-nationale.fr>, Compte rendu de séance File (last visited Oct. 10, 2000).

189. *Id.*

190. French Secretary of State for Culture and Communication Catherine Tasca, Address before the French *Sénat*, *supra* note 182.

191. In particular for defamatory materials, child pornography or other contents endangering public order (*ordre public*).

192. 47 U.S.C. § 230(b)(3), (5) (1996).

I. *The Communication Decency Act and the Digital Millennium Copyright Act*

a. *ISP Liability Under Defamation Law and for Indecent and Obscene Content*

In the U.S., Congress first tackled the issue of ISP liability under defamation law. The case law had been analogizing ISPs sometimes to publishers and sometimes to distributors, which led to inconsistent results as to their liability.¹⁹³ The Communication Decency Act of 1996 (CDA) provided a clear rule by rejecting the publisher-type liability: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."¹⁹⁴ The Fourth Circuit upheld this approach in *Zeran v. America Online, Inc.*, when the Court stated that it could not hold ISPs to the same standards as publishers for an alleged failure to exercise traditional functions "such as deciding whether to publish, withdraw, postpone, or alter content."¹⁹⁵ The Fourth Circuit recognized a congressional intent to preserve free speech on the Internet and Congress' choice of the *Cubby*¹⁹⁶ solution over the one developed in *Stratton*.¹⁹⁷ Courts could, however, still hold liable ISPs that knowingly distributed defamatory content.¹⁹⁸ Again, the CDA provides for a limitation of liability if an ISP took actions "in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."¹⁹⁹ Therefore, the CDA resolved the judicial uncertainty regarding ISP editorial liability for defamatory content.

The CDA also clearly targeted indecent, obscene material and pornography on the Internet. The Act targeted transmission and creation of obscene or indecent material knowingly directed to a recipient who is under eighteen years old.²⁰⁰ The mere act of permitting the use of a telecommunication facility under one's control for purposes of transmitting obscene or indecent content may entail liability.²⁰¹ The Act also states that

193. See *supra* Part I.A.

194. 47 U.S.C. § 230(c)(1) (1996).

195. *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). Other courts have followed this approach. *Accord* *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.C. Cir. 1998) (holding that 47 U.S.C. § 230 created a federal immunity for ISPs); *Ben Ezra, Weinstein & Co. v. America Online, Inc.*, 206 F.3d 980 (10th Cir. 2000) (holding that America Online was immune from liability for third party's content under 47 U.S.C. § 230).

196. *Cubby, Inc. v. Compuserve, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

197. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 23 Med. L. Rptr. 1794 (N.Y. Sup. Ct. 1995); see also *Carome & Jain*, *supra* note 179 (commenting on *Zeran* and stating that Congress directly intended to overrule *Stratton* to provide ISPs with a federal immunity); *Rojas*, *supra* note 5, at 1017-18 (commenting on *Zeran* and Congress' "anti-*Stratton*" provisions).

198. *Cunard et al.*, *supra* note 8, at 426.

199. 47 U.S.C. § 230 (c)(2) (1996).

200. 47 U.S.C. § 223 (a)(1)(A)-(B) (1996).

201. *Id.* § 223 (a)(2).

an ISP is to be held to the same standard of liability as a publisher for this kind of communications.²⁰² However, the Supreme Court found that the provisions concerning indecency were too vague under the protection offered by the First Amendment.²⁰³ In response, Congress enacted the Child Online Protection Act of 1998 (COPA), to prevent transmission of material "harmful to minors" for commercial purposes.²⁰⁴ Again, the constitutionality of certain restrictive provisions of COPA is questionable, as it would oblige ISPs to comply with the most restrictive community's standards amongst those of communities from which users could access the potentially harmful online content.²⁰⁵ Moreover, courts have found that it was technically difficult to restrict access to specific users or members of a specific community.²⁰⁶ Thus, in the area of indecent content the standard of liability is not clearly established yet.

b. ISP Liability Under Copyright Law

Congress also tackled the issue of ISP²⁰⁷ liability for third-party's copyright infringements.²⁰⁸ Title II of the Digital Millennium Copyright Act (DMCA) limits ISP liability for copyright infringement in the context of transitory digital network communications,²⁰⁹ system caching to provide quick and easy access to users,²¹⁰ data stored for the benefit of users,²¹¹ and providing information location tools that allow users to consult infringing materials.²¹² In summary, although it does not affect the common law principles for copyright infringement, the DMCA creates safe harbors for ISPs unaware of the presence of infringing material and ready to remove or disable access to the material on notice of infringement.²¹³

Title 17 of the United States Code eliminates direct liability for ISPs which implement measures to terminate repeat infringers and provisional technical measures to protect copyrighted works.²¹⁴ Title 17 also directly addresses the issue of contributory and vicarious liability and creates a

202. See *id.* § 230(e)(1).

203. *Reno v. ACLU*, 521 U.S. 844 (1997).

204. 47 U.S.C. § 231 (1996).

205. Goldstein, *supra* note 23, at 614-24.

206. *ACLU v. Reno*, 31 F. Supp. 2d 473 (E.D. Pa. 1999), *aff'd*, 194 F.3d 1149 (3d Cir. 2000).

207. Under the Act, "service provider" has a broad definition, as it means "a provider of online services or network access, or the operator of facilities." 17 U.S.C. § 512(k)(1)(B) (1998).

208. For a detailed summary of the safe harbors, see Cunard et al., *supra* note 8, at 390-96. For a summary of the recent legislative history, see Weiskopf, *supra* note 5, at 49-53.

209. 17 U.S.C. § 512(a) (1998).

210. *Id.* § 512(b).

211. *Id.* § 512(c).

212. *Id.* § 512(d).

213. For a clear and concise summary of the different conditions required to benefit from the safe harbor scheme, see Berschadsky, *supra* note 9, at 768-70. See also Ballon & Kupferschmid, *supra* note 61. For an overview of both the Communication Decency Act and the Digital Millennium Copyright Act, see Strowel & Ide, *supra* note 2, at 49-62.

214. See 17 U.S.C. § 512(i) (1998).

safe harbor for ISPs.²¹⁵ This section uses a set of case law solutions: ISPs must not have actual knowledge²¹⁶ of the infringing activity and the material must not be infringing on its face;²¹⁷ ISPs must not get any direct financial gain from the infringing activity;²¹⁸ ISPs must remove or disable access to the infringing work once they gain knowledge of infringement²¹⁹ or once they are put on notice of infringement.²²⁰ Noticeably, this section provides procedures ISPs must follow to ease the receipt of notice of infringement²²¹ and to process these claims.²²² By the same token, it makes clear the kind of notice that could trigger ISPs' liability if they do not act with promptness.²²³ Moreover, under the Act, an ISP that wrongfully removes content after it is put on notice of infringement by a third party is not liable so long as it notified its subscribers of the removal.²²⁴

Therefore, the DMCA uses case law solutions to create safe harbors for ISPs, which provides them with more legal certainty.²²⁵ The legislative history clearly points out the legislature's attempt to clarify the relevant case law.²²⁶ Title II of the DMCA "codifies the core of current case law dealing with the liability of on-line service providers, while narrowing and clarifying the law in other respects."²²⁷ For instance, the Act creates a safe harbor for temporary copies of e-mails that are automatically created on servers for purposes of transmission.²²⁸ So long as the ISP respects the conditions set forth in 17 U.S.C. § 512(a), there is no liability for monetary relief under the Copyright Act even though the copies at stake concern

215. However, the statute's articulation of the vicarious liability for ISPs and its articulation with the safe harbor provided for in 17 U.S.C. § 512(c)(1)(B) is unclear, as courts have not yet defined the level of control that is sufficient to find an ISP vicariously liable. Wright, *supra* note 83, at 1027-36 (arguing that the direct-control approach is the best way to leave some leeway to ISPs to monitor content without depriving them of the safe harbor provisions).

216. 17 U.S.C. § 512(c)(1)(A)(i) (1998).

217. *Id.* § 512(c)(1)(A)(ii).

218. *Id.* § 512(c)(1)(B).

219. *Id.* § 512(c)(1)(A)(iii).

220. *Id.* § 512(c)(1)(C).

221. *Id.* § 512(c)(2) (requiring the designation of an agent to receive claims of alleged infringements).

222. *Id.* § 512(c)(1)(C), (c)(3)(B)(ii), (d)(3), (f).

223. Yen, *supra* note 81, at 1884-87.

224. 17 U.S.C. § 512(g).

225. However, the DMCA might not remove the case law incentives for ISPs to unduly affect Free Speech. Yen, *supra* note 81, at 1888-89 (stating that the Act creates bad First Amendment effects because: (1) "it ossifies and perpetuates ambiguities in existing law that encourage ISPs to indiscriminately remove material from the Internet;" (2) it "increases the incentive for indiscriminate removal of material by protecting ISPs from actions by their subscribers;" (3) it "exacerbates the effect of any mistaken action against speech by effectively circumventing the procedures that would normally protect a copyright defendant from unjustified curtailment of her free speech rights.").

226. COBLE, WIPO COPYRIGHT TREATIES IMPLEMENTATION AND ON-LINE COPYRIGHT INFRINGEMENT LIABILITY LIMITATION, H.R. REP. NO. 105-551, pt. 1 (1998).

227. *Id.* at 11 (making straightforward references to *Religious Technology* and *Frena* and stressing in which respects the bill overrules or departs from those cases).

228. 17 U.S.C. § 512(a) (1998).

infringing materials that users have sent.²²⁹ Internal and external factors have pushed the French legal framework closer to the American one. This trend, however, cannot go as far as uniformity since legal and political endemic factors are and will be at play in France.

2. French Enactments and Comparison to the U.S. Legislation

a. Evolution

In France, the first attempt to limit ISP liability by statute dates back to 1996. The French Secretary of State for Postal Services and Telecommunication introduced a bill that provided an insulation from penal liability for ISPs that gave a screening software to their subscribers and disabled access to illegal content on notice from the *Comité Supérieur de la Télématique*, an administrative body.²³⁰ This bill purported to create a presumption of liability and a safe harbor in case of compliance to orders of the *Comité Supérieur de la Télématique*.²³¹ In June 1999, the French Chamber of Representatives (*Assemblée Nationale*) adopted a new bill that greatly limited ISPs' liability: the *Amendement Bloche*. The final bill, adopted by both the French Senate and the French Chamber of Representatives slightly narrowed ISPs' safe harbor; as explained later, the French *Conseil Constitutionnel* also censored part of the bill.²³² Both domestic and international influences have driven the French legislature to this solution.

b. Domestic and International Influences

The French case law, the American DMCA, and the European Directive of June 8, 2000 on the information society and electronic commerce significantly influenced the dispositions of this bill.²³³ The European directive is very similar to the U.S. DMCA, but its scope is broader as it is not limited to copyright.²³⁴ It creates safe harbors for ISPs under the same conditions as the DMCA²³⁵ and draws the same functional distinctions regarding mere conduit, caching and storage of data dedicated to users.²³⁶ The

229. *Id.*; see also Cunard et al., *supra* note 8, at 391-92.

230. Thoumyre, *supra* note 36.

231. *Id.*

232. Law No. 2000-719 of August 1, 2000, Art. 43-8, J.O., August 2, 2000, p. 11903.

233. Member of Parliament Pierre Bloche, Address to the French *Assemblée Nationale*, *supra* note 188 (citing Lacoste); see also Senators Pierre Hérisson, Alain Joyandet and Michel Pelchet, Address before the French *Sénat*, *supra* note 182 (making references to the U.S. DMCA notification procedures); French Secretary of State Catherine Tasca and Senator Pierre Hérisson, Address before the French *Sénat*, *supra* note 182 (making reference to the European Directive on Electronic Commerce).

234. European Parliament and Council Directive 2000/31/EC of 8 June 2000 on certain Legal Aspects of Information Society Services, in particular Electronic Commerce in the Internal Market, art. 15, 2000 O.J. (L 178), 1, 13 [hereinafter Directive on E-Commerce]. The Directive sometimes uses the exact same terms as the DMCA. For a comparison of both texts, see Sédallian, *supra* note 14. For an overview of the European Union law that deals with online copyright infringement, see Strowel & Ide, *supra* note 2, at 63-83.

235. Directive on E-Commerce, *supra* note 234.

236. *Id.* at Chapter II, art. 12-14.

directive, however, does not provide for notification procedures.²³⁷ Article 15 of the directive states that ISPs have no general obligation to check the content of the information they transmit or store, if they did not create or modify it.²³⁸

These underlying factors that influenced the French legislature help the understanding of the similarity of the French and American statutory solutions. Those factors, however, also explain why those frameworks cannot provide identical solutions.

c. The Asymptotic Convergence of French and U.S. Legislation

Not surprisingly, the French *Amendement Bloche* repeats some of the general principles found in the DMCA: no presumption of liability of ISPs and safe harbor in case ISPs act expeditiously once on notice of illicit content.²³⁹ The newly enacted amendment reads as follows:

Physical or moral persons who provide, gratuitously or for profits, permanent and direct storage for putting signals, writings, images, sounds or messages of whatever nature to the public's disposal, may be liable under civil or penal law for the content of these services only if once notified by a judiciary authority, they did not promptly acted to stop the access to this content.²⁴⁰

237. Rojinsky, *supra* note 12 (commenting on these differences and stating that the lack of provisions concerning notification procedures in the E.U. Directive amounts to a lack of safeguards for Free Speech matters).

238. Directive on E-Commerce, *supra* note 234.

239. Law no. 2000-719 of August 1, 2000 modifying Law no. 86-1067 of September 30, 1986, art. 43-8 (the obligation to act only arises when the judicial authority issues a notification). The French law also requires ISPs to gather information that would allow the actual identification of the people who contributed to the creation of any content. *Id.* arts. 43-9, 43-10. Note that the TGI of Paris was the first court to apply those provisions and found that an ISP was not liable for defamatory or infringing content posted by its subscribers when the ISP provided the plaintiff with sufficient information to identify the authors of the Web site at stake. *SARL One Tel v. SA Multimaniania*, TGI Paris, Sept. 20, 2000, available at <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000920.htm> (last visited Sept. 6, 2001). For an interesting and comprehensive history of the modifications of the *Amendement Bloche* during the legislative debates both before the French *Sénat* and the French *Assemblée Nationale*, see *Responsabilité des Acteurs de L'Internet, Loi sur la Communication audiovisuelle modifiant la loi du 30/09/1986*, at <http://www.legalis.net/jnet/2000/loi-audio/projetloi3.htm> (last visited Apr. 9, 2001). For analyses on the *Amendement Bloche*, see Joel Heslaut, *Acteurs de l'Internet, Responsables mais pas Coupables* [Internet Actors, Responsible but not Guilty], *LES PETITES AFFICHES*, no. 177, at 4 (Sept. 5, 2000). See also Alain Bensoussan and Pierre Noguier, *Hébergeur de contenu: Irresponsabilité Actuelle/Responsabilité Virtuelle?* [Hosting Service Providers: Actual Irresponsibility/Virtual Responsibility?], *Gaz. Pal.* 2000, no. 301-302, at 26; Frédéric-Jérôme Pansier and Emmanuel Jez, *La Responsabilité des Hébergeurs à l'Aune de la Loi du 1er Août 2000 - Bilan Acquis Jurisprudentiels et d'une Réforme Législative Amputée*, *Gaz. Pal.* 2000, no. 252-253, at 19.

240. Law No. 2000-719 of August 1, 2000, art. 43-8, J.O., Aug. 2, 2000, p. 11903; JCP 2000, III, *Aperçu Rapide*, 1739. Note that this provision expressly applies to hosting service providers (*hébergeurs*) that store and process data for subscribers. Another provision defines affirmative, and limited duties of IAPs. Under article 43-7, IAPs that provide access to services which include more than mere tools for private correspondence, must disclose to their subscribers the means available to restrict access to certain services or to select services, and must also propose to their subscribers at least one of

Referring to the legislative debates, "acting promptly" is tantamount to the notion of "*diligences appropriées*" already used by French judges.²⁴¹ This requirement is also found in 17 U.S.C. § 512(c) that provides for a safe harbor for infringing content uploaded on an ISP's server: once it obtains knowledge, is aware of suspect circumstances, or is put on notice, an ISP must act expeditiously to remove access to the infringing content to qualify for the safe harbor.²⁴² The French Secretary of State of Culture and Telecommunication defined this notion as ISPs' obligations to check the presence of an allegedly illegal content, inform the author and the damaged party of available procedures, or even disable access to the infringing material under certain circumstances.²⁴³

Moreover, according to European Union law, EU directives must be made applicable (*transposée*) under French national laws.²⁴⁴ IAPs, however, are still subject to the French general law²⁴⁵ and the EU directive does not "affect the possibility of injunctions" like "orders by courts or administrative authorities requiring the termination or prevention of any infringement, including removal of illegal information or disabling of access to it."²⁴⁶ The directive does not forbid monitoring obligations imposed by orders of national authorities in accordance with national legislations and the requirement²⁴⁷ of compliance to duties of care under national laws in order to prevent and detect certain categories of illegal activities.²⁴⁸ Therefore, although the U.S. and French schemes are converging in order to limit ISP liability, it is obvious that differences found in principles of national substantive general law will still cause different treatments of ISP liability in each country.²⁴⁹ Moreover, in both countries legislative attempts to reg-

those means. Law No. 2000-719 of August 1, 2000, art. 43-7, J.O., Aug. 2, 2000, p. 11903; JCP 2000, III, *Aperçu Rapide*, 1739.

241. See *supra* Part I.B.3.a. Noticeably, the French *Conseil Constitutionnel* [Constitutional Council] struck down a provision defining ISPs' duty to take *diligences appropriées* when third-parties inform them that they are hosting illegal or damaging content. Law No. 2000-719 of August 1, 2000, art. 43-8, J.O., Aug. 2, 2000, p. 11903; JCP 2000, III, *Aperçu Rapide*, 1739; see also Cons. const., no. 2000-433 DC of July 27, 2000, J.O., Feb. 8, 2000; JCP 2000, *Aperçu Rapide*, 1739 (invalidating part of art. 43-8).

242. 17 U.S.C. § 512(c)(1998); see also Cunard et al., *supra* note 8, at 393-94.

243. French Secretary of State Catherine Tasca, Address to the French *Sénat*, *supra* note 182; see also French Secretary of State Catherine Tasca, Address before the French *Assemblée Nationale*, *supra* note 188.

244. JEAN BOULOUIS, *DRIT INSTITUTIONNEL DE L'U.E.* 425-32 (5th ed., Domat Droit Public, Montchrestien) (1995).

245. See the French legislative debates in the French *Sénat* and the French *Assemblée Nationale*, *supra* note 182.

246. Directive on E-Commerce, *supra* note 234, at "Whereas" (45).

247. *Id.* "Whereas" (46).

248. *Id.* "Whereas" (47).

249. See French Secretary of State Catherine Tasca, Address before the French *Sénat*, *supra* note 182.

Did France choose to reproduce the results of the U.S. model? I do not think so. Our tradition is to protect the different kinds of freedom, not only to proclaim them. However, in the name of a great principle [Free Speech], it is possible to praise racism, to support revisionist thesis, to develop confusion between information and advertisement . . . This is not worthy of our understanding of the notion of freedom of choice.

ulate the Internet went through constitutional scrutiny that led to some modifications of the intended regulations.²⁵⁰ However, convergence might increase, as the French government is about to pass a bill (*projet de loi*) which would make it one of the first EU member states that transpose the EU Directive on E-commerce.

d. Recent Developments Should Increase the Pace of Convergence

The French government's tentative draft of the law on Information Society states that: (1) hosting service providers and IAPs have no general obligation to screen contents transmitted on the Internet; (2) hosting service providers may incur civil liability if they have actual knowledge of a manifestly illicit content and still omit to remove it; (3) judges can resort to increased powers to take down illicit contents; (4) ISPs cannot be liable for contents they transmit or temporarily stock when they do not provide any further services.²⁵¹

Article 11 and 13 of the tentative bill on Information Society transpose the dispositions of the EU Directive on E-commerce that concern ISP civil liability. Article 11 of Title I, Chapter II of the tentative bill modifies the text of the *Amendement Bloche* to remove any reference to penal liability for ISPs.²⁵² This is in accordance with the comments of the *Conseil Constitutionnel* on the earlier draft and with the difficulty of holding an ISP liable as an accomplice of a direct infringer, as in most of the cases an ISP has not the requisite *mens rea*. Article 11 also makes clear that, unless the judicial authority orders it, an ISP has no obligation to promptly take down an infringing Web site save when it has actual knowledge of obviously illicit content.²⁵³ Moreover, Article 11 states that ISPs "are subject neither to a general obligation to monitor the contents they transmit or that they stock, nor to a general obligation to actively look for facts or circumstances that would unveil illicit activities."²⁵⁴ Under Article 11 and Article 12 of Title I, Chapter II of the tentative bill, the President of the *Tribunal de Grande Instance* has increased power to order ISPs to remove access to information

Id.

250. In the U.S., the Supreme Court struck down some provisions of the CDA that attempted to regulate children's access to indecent material because they unduly burdened protected speech. *Reno v. ACLU*, 521 U.S. 844, 882 (1997). For comments on risks of pre-censorship at ISPs' level under U.S. Internet regulations, see STEVEN E. MILLER, *CIVILIZING CYBERSPACE: POLICY, POWER AND THE INFORMATION SUPERHIGHWAY* 131 (1996). In France, the *Conseil Constitutionnel* censored most of the dispositions of the *Amendement Fillon*, Cons. const., no. 96-378 DC, July 23, 1996, J.O., July 27, 1996, p. 11400; D. 1998, Somm. 146, and some of the dispositions of the *Amendement Bloche*, Cons. const., no. 2000-433 DC of July 27, 2000, J.O., Feb. 8, 2000, p. 11922; JCP 2000, *Aperçu Rapide*, 1739.

251. Ministère de l'économie, des finances et de l'industrie [French Department for Economy, Finance and Industry], *Projet de Loi sur la société de l'information* [tentative bill on Information Society], tit. 2, §2, arts. 11-13, at <http://www.finances.gouv.fr>, Vie des Entreprises: Accès Thématique: Nouvelles Technologies: Projet de loi Files (last visited Sept. 6, 2001).

252. *Id.* art. 11(1)(a).

253. *Id.* art. 11(1)(b).

254. *Id.* art. 11(II).

that would cause damages.²⁵⁵ Finally, Article 13 of the tentative bill provides for a safe harbor for system caching;²⁵⁶ it also provides for the absence of civil liability for ISPs when they merely transmit information and do nothing more.²⁵⁷

These observations show a trend toward harmonization in the legal standards and methods of analysis for assessing ISPs' liability. The European directive will lead the French legal framework even closer to the U.S. framework with respect to the standard of assessment of ISP liability. Nonetheless, this harmonization does not concern the substance of the legal analysis. Substantive laws are different in the U.S. and in France. Neither the European directive, nor the French tentative bill on Information Society provides any definitions of the infringements that may trigger injunctions from French courts. These measures only deal with the definition of procedures to assess liability and requirements that ISPs should comply with to fall under safe-harbor provisions. Therefore, each judicial system may still provide a different outcome for a given issue. The French *Yahoo!* case illustrates this observation.

III. Outstanding International Differences

A. The *Yahoo!* Case

Plaintiffs LICRA (*Ligue Internationale contre le Racisme et l'Antisémitisme*), UEJF (*Union des Etudiants Juifs de France*) and MRAP (*Mouvement contre le Racisme, l'Antisémitisme et pour la Paix*) brought suit against *Yahoo!* to have this ISP disable access to messages and images relating to the Nazi ideology available at the "*Yahoo.com*" Web site.²⁵⁸ French users could read some parts of Hitler's *Mein Kampf* and of the anti-Semitic book *Le protocole des sages de Sion* (in its French version) on *Yahoo!*'s "Geocities" pages.²⁵⁹ French users could also see Third Reich memorabilia on *Yahoo!*'s auction site.²⁶⁰ Referring to Article R645-2 of the French Penal Code, the display of Nazi products for sale is a crime.²⁶¹

Thus, in May 22, 2000, Judge Gomez ordered *Yahoo!* to take remedial measures to dissuade and to make it impossible for French users to consult the Nazi oriented Web pages.²⁶² *Yahoo!* defended itself on the ground of the technical issue, arguing that it was neither possible to screen illegal content nor to determine whether the users who consulted the contents at

255. *Id.* art. 11(II), 12.

256. *Id.* art. 13.

257. *Id.*

258. Jean Eaglesham, *International Economy: Yahoo! Yields to Ruling by French Court*, FINANCIAL TIMES (London), Jan. 4, 2001, at 9.

259. *Yahoo doit filtrer l'accès à un site d'enchères nazies*, LE MONDE INTERACTIF, Nov. 20, 2000, available at <http://archives.lemonde.fr>.

260. Jonathan D. Glater, *Ideas & Trends: Hemming in the World Wide Web*, N.Y. TIMES, Jan. 7, 2001, at 5.

261. C. PÉN. art. R645-2 (Fr.).

262. *Ass'n Union des Etudiants Juifs de France v. Yahoo!*, TGI Paris, Ord. Réf., D. 2000, IR172, available at <http://www.juriscom.net/txt/jurifr/cti/tgiparis20000522.htm> (last visited Sept. 6, 2001).

issue were French.²⁶³ Therefore the judge appointed three international experts to assess the technical difficulties and efficiency of the necessary double screening.²⁶⁴ Classically, the outcome depended on the technical abilities of the ISP and implicitly on its good faith use of them to comply with legal requirements.²⁶⁵ The experts concluded that it was possible to locate 70% of the users, a figure that could be increased by 20% if Yahoo! were to ask the users who request the illegal contents to declare their nationality.²⁶⁶ This figure led the judge to conclude that Yahoo! could comply quite efficiently with his previous orders.²⁶⁷ With regard to the screening for content, the judge affirmed his prior ruling and applied the traditional solution of the French case law on point.²⁶⁸ Again, he stressed that Yahoo! was able to implement an editorial screening with search engines.²⁶⁹ Therefore, the judge held Yahoo! liable under the French Penal law and ordered it to disable access to the illegal content for French users.²⁷⁰ The judge then granted a three-month period to Yahoo! to allow it to comply with his orders.²⁷¹ At the end of this period, the judge's ordinance enjoined Yahoo! to pay FF 100,000²⁷² per day in case it would not comply with its legal obligations.²⁷³

B. A Traditional Solution and a Challenge to U.S. Constitutional Rights

1. An Original Application of a Traditional Legal Analysis

The focus on ISPs' technical ability to screen for content is a traditional focus of the French jurisprudence.²⁷⁴ It is also part of the U.S. functional analysis.²⁷⁵ The way the French judge carried on his functional analysis, however, is surprising. First, he did not follow the former jurisprudence of

263. Conclusions de la Défense [brief on behalf of Yahoo!], May 15, 2000, available at <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000522-cc-def.pdf> (last visited Sept. 6, 2001); see also Conclusions de la Défense [brief on behalf of Yahoo!], July 24, 2000, available at <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000811-cc-def.pdf> (last visited Sept. 6, 2001).

264. *Union des Etudiants Juifs de France*, TGI Paris, Aug. 11, 2000, Ord. Réf., at http://www.legalis.net/cgi-iddn/french/affiche-jnet.cgi?droite=decisions/responsabilite/orod_tgi-paris_110800.htm (last visited Sept. 6, 2001).

265. Valérie Sédallian, *Commentaire de l'affaire Yahoo!* (Oct. 2000), at <http://www.juriscom.net/chr/2/fr20001024.htm>.

266. *Union des Etudiants Juifs de France*, TGI Paris, Nov. 20, 2000, Ord. réf., J.C.P. 2000, Actu., 2219, available at <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.pdf> (last visited Sept. 6, 2001). The experts' report is available at http://www.legalis.net/jnet/2000/actualite_11_2000.htm (last visited Feb. 3, 2001).

267. *Id.*

268. *Id.*

269. Sédallian, *supra* note 265.

270. *Union des Etudiants Juifs de France*, TGI Paris, Nov. 20, 2000, Ord. réf., J.C.P. 2000, Actu., 2219.

271. *Id.*

272. Almost U.S.D. 13,600.

273. *Union des Etudiants Juifs de France*, TGI Paris, Nov. 20, 2000, Ord. réf., J.C.P. 2000, Actu., 2219.

274. Sédallian, *supra* note 265.

275. See *supra* Part II.A.

his own court.²⁷⁶ Second, he expressly stressed he was assessing the good faith of the ISP-defendant in using its technical device.²⁷⁷ The appointed experts, however, did not give a unanimous conclusion regarding the technical ability to screen illegal content and to screen users.²⁷⁸ The issue of good faith attempt to remedy the situation with the technical means available seems to be a critical factor. Judge Gomez noticed that Yahoo! already disallowed the sale of living animals, body parts, cigarettes, and products related to pedophilia on its auction Web site.²⁷⁹ Then, the judge stressed that it would not be too costly to ban Nazi memorabilia from the auction Web site.²⁸⁰

In contrast, two days after Judge Gomez decided the *Yahoo!* case in favor of UEJF, another judge rendered his verdict on similar facts and

276. UEJF brought suit against French ISPs to have them disable access to anti-Semitic messages they hosted. Plaintiff UEJF asked the judge to appoint an expert to assess the technical means available to achieve its demand. The judge refused and stressed that although UEJF's fears were worthy, freedom of speech amounted to a principle of fundamental value. Therefore, he concluded that an expert report would have no legal value for the case at hand as there was no way to decide the settlement of a global prohibition system based on *a priori* censorship. Such a decision would, in effect, contradict Article 5 of the French Civil Code that forbids judges from "decid[ing] by way of a general and rule-making decision the cases submitted to them." (Article 5 simply states that judges must not create the law and encroach on the legislature's domain). *Ass'n Union des Etudiants Juifs de France v. Calvacom*, TGI Paris, June 6, 1996, Ord. réf., at http://www.legalis.net/cgi-iddn/French/affiche-jnet.cgi?droite=internet_responsabilite.htm (last visited Sept. 6, 2001).

277. The judge stressed that Yahoo! was able to send online advertisements in French to French users who consult Yahoo!'s Web sites. Thus, he concluded that Yahoo! could determine whether or not its users were French citizens. *Union des Etudiants Juifs de France*, TGI Paris, Nov. 20, 2000, Ord. réf., J.C.P. 2000, Actu., 2219. The defendant strongly disagreed with this reading and argued that the screening it was performing was not purporting to be as precise as the legal order would make it necessary. Conclusions de la Défense [brief on behalf of Yahoo!], July 24, 2000, available at <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000811-cc-def.pdf> (last visited Sept. 6, 2001). Note that the approach of the French judge is similar to the one the *Religious Technology* court had adopted in the U.S. In *Religious Technology*, the court concluded that the defendant-ISP Netcom could disable access selectively as it had previously suspended specific subscribers' accounts in numerous occasions. *Religious Tech. Ctr. v. Netcom On-Line*, 907 F. Supp. 1361, 1376 (N.D. Cal. 1995).

278. One of the experts appointed by the judge filed a separate opinion in which he expressed his doubts as to the ability to know with a sufficient certainty the nationality of users. *Union des Etudiants Juifs de France*, TGI Paris, Nov. 20, 2000, Ord. réf., J.C.P. 2000, Actu., 2219. The defendant constantly argued on the technical issue. Conclusions de la Défense [brief on behalf of Yahoo!], July 24, 2000, available at <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000811-cc-def.pdf> (last visited Sept. 6, 2001). The defendant also stressed the contradiction between the expert report and the judge's conclusions. *Id.* For a general argument on the practical impossibility to implement screening procedures, see Mark A. Lemley, *The Law and Economics of Internet Norms*, 73 CHI-KENT L. REV. 1257, 1288-92, (1998) (stating that filters are either over or under inclusive and that they lack flexibility to truly reflect legal norms).

279. *Union des Etudiants Juifs de France*, TGI Paris, Nov. 20, 2000, Ord. réf., J.C.P. 2000, Actu., 2219; see also Valérie Sédallian, *Commentaire de l'affaire Yahoo!* (2) (Jan. 2001), at <http://www.juriscom.net/chr/2/fr20010112.htm>.

280. *Union des Etudiants Juifs de France*, TGI Paris, Nov. 20, 2000, Ord. réf., J.C.P. 2000, Actu., 2219.

issues against UEJF.²⁸¹ In this case, Multimania hosted a Web site entitled “nsdap” (an acronym for the Nazi party) whose content related to Adolf Hitler, the Nazi ideology, Nazi texts, and symbols.²⁸² Once on notice, Multimania removed access to the Web site. Multimania had also supervised the Web sites it hosted by use of a search engine and key words relating to usual illegal content found on the Internet.²⁸³ Unfortunately, Multimania had not used the acronym “nsdap” for its search.²⁸⁴ However, the court found that Multimania acted reasonably and promptly given its competence and the technical means available to detect illegal content.²⁸⁵ Finally, the court held that Multimania was not liable.²⁸⁶ On the contrary, Judge Gomez did not find evidence of Yahoo!’s good faith attempt to remedy the situation at stake.

The Yahoo! court confirmed the trend of the French case law in finding an editorial liability of ISPs based on the general law – here in its penal branch.²⁸⁷ Again, this result is not surprising as other courts previously did the same through the use of the French Civil Code.²⁸⁸ What really shocked U.S. commentators must have been the substantive law that prevailed and the French judge’s acceptance of jurisdiction over the subject matter at stake.²⁸⁹

2. *Divergent Substantive Laws*

The ban on the display of Nazi symbols and messages under French penal law is at odds with the free speech principle found in the First Amendment of the U.S. Constitution.²⁹⁰ Such an amazing divergence between France and the U.S. has nothing to do with the procedures and principles used to assess ISP liability. It is the consequence of the application of different substantive laws.²⁹¹ Despite the definition of safe harbors, ISPs still fall

281. *Ass’n Union des Etudiants Juifs de France v. SA Multimania Prod.*, TGI Nanterre, May 24, 2000 (holding that the hosting service provider has no obligation to scrutinize in detail and in depth the Web sites it hosts), at http://www.legalis.net/cgi-iddn/french/affiche-jnet.cgi?droite=internet_responsabilite.htm (last visited, Sept. 6, 2001).

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *See supra* Part I.A.2.

288. *See supra* Part I.A.2.

289. Glater, *supra* note 260; *see also* Sebastian Mallaby, *Le Net, c’est Moi: The French Attempt to Rule Their Cyberspace*, WASH. POST, Nov. 27, 2000, at A21.

290. Sédallian, *supra* note 265.

291. *Id.* Concerning the issue of the prohibition of display and trade of Nazi-related objects and texts, it also illustrates distinct histories that led to differences in substantive laws. It is easy to understand the European sensitivity to this issue. In France, the Nazi ideology relates to universal disgust towards war crime and crimes against humanity some of which took place within the French territory. It also refers to the period of the German *Occupation*, of the *collaboration*, the *poignée de main de Montoire*, and of the shameful government of Vichy. These wounds, deeply rooted in French history, explain the stand of the French Penal Law with respect to Nazi side-products. These reasons, of course, cannot be and will never be found in the U.S. History is one of several factors that explain differences between the French and U.S. approaches to free speech. *See*

under the scope of the general law (*droit commun*) in France and of the common law in the United States. That is to say, whereas the legislature and the case law have devised specific rules that concern ISPs, they are still liable under the principles found in the general law.²⁹² This situation should not change under the EU directive.²⁹³ Thus, the *Yahoo!* decision is sound both with respect to the French jurisprudence and the French and European current statutory frameworks, although the statutory trend is to increase the number of situations in which ISPs could benefit from safe harbors.

Nobody truly expects the French general law to be the same as the common law developed in the U.S. The Internet, however, makes differences between national laws even more obvious and burdensome because it is an interactive tool that falls under several jurisdictions at the same time.²⁹⁴

3. *Jurisdiction and the Internet: French and U.S. Approaches*

French judges traditionally consider themselves competent to hear a case so long as the harm occurred within French territory, which is always the case for Internet matters as the allegedly damaging material can be consulted from French territory.²⁹⁵ Interestingly, the application of American case law rules for U.S. jurisdiction as applied to Internet matters might have led to the same result under the facts of the *Yahoo!* case. A majority of American courts have followed a "sliding scale" approach to take jurisdiction in Internet matters.²⁹⁶ A court will take jurisdiction if the non-resident defendant-ISP has sufficient minimum contacts with the forum,

generally Stephen J. Roth, *The Laws of Six Countries: An Analytical Comparison*, in *UNDER THE SHADOW OF WEIMAR: DEMOCRACY, LAW, AND RACIAL INCITEMENT IN SIX COUNTRIES* 177 (Louis Greenspan & Cyril Levitt eds., 1993).

292. See *supra* Part II.

293. See *supra* Part II.

294. See generally Michael J. O'Sullivan, *International Copyright: Protection for Copyright Holders in the Internet Age*, 13 N.Y. INT'L L. REV. 1 (2000); Jennifer M. Driscoll, *It's a Small World After All: Conflict of Laws and Copyright Infringement on the Information Superhighway*, 20 U. PA. J. INT'L ECON. L. 939 (1999); Samuel Fifer & Michael Sachs, *The Price of International Free Speech: Nations Deal With Defamation of the Internet*, 8 DEPAUL-LCA J. ART & ENT. L. & POL'Y 1 (1997).

295. Sédallian, *supra* note 265. For torts, article 46 of the French *Nouveau Code de Procédure Civile* [New Code of Civil Procedure] entitles a victim to choose either to bring a suit where the event that is the proximate cause of the damage took place, where the harm occurred (*lex loci delicti*), or where the defendant has his regular residence (*actor sequitur forum rei*). N.C.P.C., art. 46 (Fr.). It is on this ground that in *Lacoste* the TGI of Nanterre found itself competent to hear the case. *Lacoste v. Société Multimania*, TGI Nanterre, Dec. 8, 1999, J.C.P. 1999, II, 10279, note F. Olivier, E. Barbry (stating that "the harm materializes where data are downloaded by anyone who wants to connect to the Internet."), available at <http://www.juriscom.net/txt/jurifr/img/tginanterre19991208.htm> (last visited Sept. 6, 2001).

296. Christopher Paul Boam, *The Internet, Information and the Culture of Regulatory Change: A Modern Renaissance*, 9 COMM'LAW CONSPECTUS 175, 191-92 (2001); Mark C. Dearing, *Personal Jurisdiction and the Internet: Can the Traditional Principles and Landmark Cases Guide the Legal System Into the 21st Century?*, 4 J. TECH. L. & POL'Y 4 (1999).

purposefully availed itself of the forum's laws, the claim arises from these contacts, and the exercise of jurisdiction is reasonable.²⁹⁷ Three categories compose the "sliding scale":

At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.²⁹⁸

Yahoo! promoted goods on its auction Web site and also made advertisements in French,²⁹⁹ which shows a specific intent to reach a French audience to promote and sell goods to French citizens. Thus, Yahoo! could fall into the first category of the sliding scale. However, many determinative facts fail to reach a firm conclusion on this issue. For instance, courts usually analyze the quantity and quality of contacts with the forum state to decide the issue of minimum contacts.³⁰⁰ Moreover, there are no facts that permit a conclusion as to whether or not the exercise of jurisdiction by a French court is reasonable. However, it is sufficient to note that under the prevailing facts, even the application of American case law solutions could lead to the conclusion that the French jurisdiction over Yahoo! was proper.

Therefore, the *Yahoo!* case does not reflect a general contradiction between specific regulations of the Internet in France and in the U.S. (although some contradictions do exist). Rather, this is the consequence of substantial differences found in the general law of each country that interfere with the assessment of ISP liability. In effect, ISPs are still liable under the general law of each country.

297. This is the application of the traditional "minimum contacts" doctrine developed by the U.S. Supreme Court in a well-known combination of landmark cases. See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1122-23 (W.D. Pa. 1997); see also *Dearing*, *supra* note 296.

298. *Zippo Mfg.*, 952 F. Supp. at 1124 (internal citations omitted); see also *Boam*, *supra* note 296, at 191-92.

299. Mere advertisements on a Web site do not amount to the required minimum contacts by themselves. See *Millennium Enter. v. Millennium Music, LP*, 33 F. Supp. 2d 907, 916 (D.Or. 1999) (finding that "[m]ost courts . . . decline to assert jurisdiction based solely on Web site advertising.).

300. See *Winfield Collection, Ltd. v. McCauley*, 105 F. Supp. 2d 746 (E.D. Mich. 2000) (holding that the Internet sales of two crafts through an e-bay auction Web site were not sufficient to find the required minimum contacts to exercise personal jurisdiction over the non-resident defendant); *Dearing*, *supra* note 296, ¶¶ 27-28.

Conclusion and Recommendations

Both the French and the U.S. case law have developed similar solutions regarding the definition of ISP liability. In both countries, the legal uncertainty that arose out of inconsistent cases was an important factor that led legislatures to implement specific regulatory schemes. In France, internal and external factors influenced the legislature in a way that made it enact regulations based on principles similar to those found in U.S. regulations. However, both the French and the U.S. legislatures decided that the general law would usually govern ISP liability. Therefore, in spite of an apparent convergence of both the French and the U.S. schemes, both systems sometimes lead to different solutions that reflect differences in substantive national laws.

The *Yahoo!* case is a striking illustration of this fact in the area of free speech.³⁰¹ It is not a remote and unique example in Europe.³⁰² The *Yahoo!* case demonstrates that ISPs have to consider domestic legislation in order to avoid legal and business risks.³⁰³ These burdens are rather foreseeable and the situation of Internet companies is similar to that of companies that avail themselves to the privileges of different forums when they put their goods into the stream of commerce of several markets. They must comply with domestic product liability legislations and domestic corporate laws for instance. Compliance with domestic laws amounts to the cost of doing business in specific countries via the Internet.³⁰⁴ The interactive nature of the Internet, however, can cause some contents to reach unintended users. Given the way French judges find themselves competent to decide on Internet-related wrongs, U.S. ISPs are at risk of being held liable under French laws while complying with U.S. laws.³⁰⁵ Under the prevailing French bases for jurisdiction, French plaintiffs might well take advan-

301. This Note does not purport to assess the merits of the French *Yahoo!* case for Free Speech purposes. It does not analyze whether the Internet should be an area of self-regulation either.

302. In 1995, Compuserve blocked access to 200 sex-oriented newsgroups for four million of its subscribers worldwide because Bavarian officials began an investigation on Compuserve's alleged violations of Germany's anti-pornography law. Kim L. Rapaport, *In the Wake of Reno v. ACLU: The Continued Struggle in Western Constitutional Democracies With Internet Censorship and Freedom of Speech Online*, 13 AM. U. INT'L L. REV. 765, 788-89 (1998). In February 1997, German authorities even indicted the head of Compuserve's German subsidiary for failure to prevent dissemination of illegal material on its online service. *Id.* at 791.

303. In terms of damages and of public image for instance. See Goldstein, *supra* note 23, at 593 (stating that to make profits, Internet companies "must charge enough money to cover their expenses and liabilities. They will not be able to cover liabilities that they cannot predict. An unknown or vague standard of liability will frustrate this end.").

304. Referring to R. Raysman and P. Brown, Internet companies have adapted their way of doing business to comply with the laws of foreign jurisdictions. They report that Amazon.com "stopped shipping copies of *Mein Kampf* to customers in Germany," and that "eBay has restricted the Nazi-related memorabilia that is available through all their auctions." Richard Raysman & Peter Brown, *Yahoo! Decision in France Fuels E-Commerce Sovereignty Debate*, N.Y. L.J., Dec. 12, 2000, at 3.

305. However, this does not mean that a French judgment would necessarily be enforced in the U.S. in case the defendant-ISP has its property in the U.S. In the *Yahoo!* case, defendant Yahoo! considered the possibility of letting the French judgment go

tage of them to practice forum shopping. However, judges might use the requirement of actual damage and causation (the alleged Internet wrong must have caused an actual damage to the plaintiff) to curb abuses. Moreover, for defendants whose assets are not in France, judges have to consider the probability for plaintiff to obtain an *exequatur* to get enforcement of a French decision in a foreign forum. Those factors provide some reasons not to overstate the risks of forum shopping and undue use of extraterritorial jurisdiction.

One solution that would decrease ISPs' legal risks would concern the choice of forum and thus the choice of the applicable law to the dispute. The criterion of the destination of the data (the public that an ISP intends to target) is fair, as an ISP that voluntarily directs its services into one forum should expect to be potentially liable in this forum.³⁰⁶ Of course, courts should deeply scrutinize the defense of lack of volitional act to target a specific public to make sure it does not amount to fraudulent evasion of statutory provisions of the forum at stake (*fraude à la loi*).³⁰⁷

Other solutions could be the application of the law of the country where the Internet server is located, or the laws of every nation where the infringing data can be consulted.³⁰⁸ Application of the former theory would entail a race to the bottom by providing incentives to ISPs to operate business from forums where substantive laws are more to their advantage in terms of liability.³⁰⁹ The latter theory would be too restrictive of Free Speech since it would oblige ISPs to cumulatively comply with all the most stringent requirements of several national laws.³¹⁰ Anyway, application of the criterion of the destination of data is at odds with the well-settled

before a U.S. judge for enforcement. Lisa Guernsey, *Yahoo Seeks to Block Judgment*, N.Y. TIMES, Dec. 22, 2000, at C4.

306. This solution would be consistent with the traditional minimum contact standard found in the U.S. O'Sullivan, *supra* note 294, at 30-31.

307. Sédallian, *supra* note 265.

308. Driscoll, *supra* note 294, at 939 (presenting the different potential solutions regarding the choice of law applicable to Internet copyright infringements and assessing the merits of each).

309. Boam, *supra* note 296, at 195, 201 (noting that "[s]ome Internet-based businesses may choose to remove operations from forums where laws are not conducive to the services they provide," and reporting that PSInet, an ISP, relocated its servers out of Germany after a Bavarian court convicted Compuserve's German manager under German anti-pornography laws.).

310. *Id.* In Europe, the European Convention for the Protection of Human Rights could also come into play regarding the protection of Free Speech. The Convention has already entered into force in France. Article 10 § 1 of the Convention provides: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." However, article 10 § 2 of the Convention provides for instances in which free speech might be limited. Those instances include the prevention of disorder, of crime, of morals, the preservation of confidential information, of the reputation of others, of the rights of others (including intellectual property rights and personal rights like the right to protect one's honor and reputation, to protect one's name, image, privacy). European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, 213 U.N.T.S. 221, ETS 005, Apr. 11, 1950, available at <http://conventions.coe.int> (last visited Apr. 8, 2000) (Council of Europe official Web site, Search on Conventions and Agreements in the European Treaty Series (ETS) Files).

French solution of the *lex loci delicti*.³¹¹ There is no reason why French courts would change their position. The French legislature could then devise a specific conflict of jurisdiction rule for Internet matters. The French legislature, however, does not seem to envision such a course of action. However, the *Conseil d'Etat* (the highest French administrative jurisdiction) stressed that concerning Internet wrongdoings, an international convention could be envisioned for determining the applicable law, the competent jurisdiction and the rules relating to *exequatur*.³¹²

Therefore, it is illusory to think that ISPs' legal risks can decrease so long as French and U.S. general laws remain different.³¹³ However, the probability of the occurrence of the risk will decrease by continuing to harmonize the specific principles under which courts assess ISP liability. Such harmonization would provide incentive for self-regulation³¹⁴ in order to avoid well-defined risks and to take advantage of safe harbor schemes. Well-defined regulations would allow ISPs to anticipate stable risks. Stability makes it more profitable to develop the technical means necessary to comply with national laws, which would further legislative goals. Providing clear and harmonized conditions to fall under safe-harbor provisions would lower the effects of divergent substantive laws on ISPs that operate in the international arena because of the specific nature of the Internet

311. Note that under Article 14 of the French Civil Code, French plaintiffs have a *privilege de juridiction* based on their citizenship: French plaintiffs, whatever their claim, can bring suit before French courts. French courts have not taken jurisdiction for Internet-related matters on this ground, because foreign courts would then certainly refuse to grant an *exequatur* to a French plaintiff trying to get recognition and enforcement of the French judgment abroad.

312. "A l'avenir, une convention internationale pourrait . . . être envisagée pour déterminer la loi applicable, le tribunal compétent et les règles d'exequatur." Rapport du Conseil d'Etat, *Internet et les réseaux numériques* (1998), at 174. Actually, the Council of Europe is preparing a Convention on Crime in Cyber-Space. Draft Convention on Cyber-Crime, Draft no. 25 REV, at <http://conventions.coe.int> (last visited Apr. 8, 2000) (Council of Europe official Web site, Draft Treaties Files). Article 9 of the draft refers to "Offences Related to Child Pornography"; article 10 refers to "Infringements of Copyright and Related Rights"; articles 11 through 13 provide for "Ancillary Liability and Sanctions"; article 23 even tackles the issue of jurisdiction, but it allows judges to take jurisdiction as provided under their national laws and it does not limit extra-territorial jurisdiction; finally, chapter III of the draft provides for international cooperation. *Id.*

313. For a comparison of French and U.S. Copyright laws, see Driscoll, *supra* note 294, at 939. For a discussion of the difference concerning defamation law in an international setting, see Fifer & Sachs, *supra* note 294, at 16.

314. As a general conclusion for the Yahoo! case, Yahoo! announced that it would stop the display of Nazi objects on its auction site. *Yahoo va interdire la vente d'objets nazis sur ses sites d'enchères*, available at <http://fr.news.yahoo.com>, Yahoo! Actualités Files (last visited Jan. 3, 2001). However, Yahoo!'s public communication seems to be very distinct in France and in the U.S. since Yahoo! brought a suit in the U.S. to have a federal court declare that the French judgment is not enforceable in the U.S. *French Court Orders Yahoo to Block Access by French Users to Sites that Auction Nazi Merchandise; Yahoo Responds by Filing Suit in U.S. Federal Court Seeking Declaration that French Judgment is Not Enforceable*, ENT. L. REP., Jan. 2001, available at LEXIS, News Library. The court declared that the First Amendment "precludes enforcement within the United States of a French order intended to regulate the content of [Yahoo!'s] speech over the Internet." *Yahoo!, Inc. v. La ligue contre le racisme et l'antisemitisme*, 169 F. Supp. 2d 1181, 1194 (N.D. Cal. 2001).

network.³¹⁵ Then, it would be fair to hold liable ISPs that avail themselves of business opportunities in several nations (that is to say ISPs that target these nations' consumers) without respecting the legal rules of these nations or the requirements to fall under safe-harbor provisions. The fairness would come from the opportunity ISPs would have to make a cost-benefit analysis balancing the cost of implementing screening technology, the opportunity cost of refusing to transfer data in one national market, and the legal risks of being held liable under the laws of that nation. As a conclusion, in the words of a French scholar, *dans le cybermonde, le droit n'a pas vocation à être virtuel*.³¹⁶

315. Internet is a global medium. Therefore compliance with several systems of law might be excessively burdensome, depending both on the complexity of these laws and on the availability of technical means to screen contents and subscribers ("zoning" the Internet). Christopher Wolf, *Free Ideas, France and Yahoo!*, WASH. POST, Dec. 5, 2000, at A42.

316. In the cyber world, Law will not be virtual. Michel Vivant, *Cybermonde: Droit et droits des réseaux*, JCP. G., 1996, at 401. For French articles dealing with how legal rules may apply to the Internet, see F. Meynot, S. Marcellin-Taupenas, *Internet serait-il un no man's land juridique?*, BULLETIN D'ACTUALITÉ, LAMY DROIT DE L'INFORMATIQUE, no. 81 (1996), at 1-3.

